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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 470

FRANK GIANATASIO, JR.,

Petitioner,

—v.—

FIRST LIEUTENANT EAMONN M. WHYTE, Commanding Officer, Company "A" 242nd Engineer Battalion (C) (A) CONNARNG, Stratford, Connecticut; MAJOR GENERAL E. DONALD WALSH, Adjutant General for the State of Connecticut; LIEUTENANT GENERAL JONATHAN O. SEAMAN, Commanding General, First United States Army, Fort George G. Meade, Maryland; and MAJOR GENERAL WINSTON P. WILSON, Chief, National Guard Bureau, Washington, D. C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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FRANK GIANATASIO, JR.,

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FIRST LIEUTENANT EAMONN M. WHYTE, Commanding Officer, Company "A" 242nd Engineer Battalion (C) (A) CONNARNG, Stratford, Connecticut; MAJOR GENERAL E. DONALD WALSH, Adjutant General for the State of Connecticut; LIEUTENANT GENERAL JONATHAN O. SEAMAN, Commanding General, First United States Army, Fort George G. Meade, Maryland; and MAJOR GENERAL WINSTON P. WILSON, Chief, National Guard Bureau, Washington, D. C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Frank Gianatasio, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 2, 1970.

Opinions Below

The opinion of the Court of Appeals is reprinted in Appendix B hereto. It is as yet unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Does the ordering of petitioner to active duty in the armed forces pursuant to 10 U.S.C. Sec. 673a constitute an impairment of his contractual rights in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

2. Does the ordering of petitioner to active duty in the armed forces pursuant to 10 U.S.C. Sec. 673a constitute the imposition of punishment without due process of law in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

3. Do Army Regulation 135-91, 10 U.S.C. Sec. 673a, and State of Connecticut Military Department Regulation Number 26 (Appendix A), on their faces and as applied in this case violate petitioner's rights under the Fourth and Fifth Amendments to the United States Constitution to be secure in his person and to earn a livelihood without unwarranted interference?

Constitutional Provisions, Statutes and Regulations Involved

The judgments of the courts below violate Petitioner's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The statutes and regulations involved are set forth in Appendix A to this petition.

Statement of the Case

On July 14, 1965, petitioner enlisted in the Connecticut Army National Guard. On that date, petitioner and a duly authorized representative of the National Guard executed an enlistment agreement (Appendix C), defining the term and extent of petitioner's obligation and reading in part as follows:

> "If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of forty-five days or be reported to Selective Service for immediate induction."

This provision is consistent with the relevant statutes then in effect, to-wit: 50 U.S.C. App. Sec. 456(2)(A). and 10 U.S.C. Sec. 270(b).

Two years later Congress enacted 10 U.S.C. Sec. 673a which made available a third alternative in the case of a Ready Reservist (which term, by virtue of 10 U.S.C. Sec. 269(b), includes a National Guardsman) who has allegedly participated unsatisfactorily in the activities of his unit.

Thereafter, 32 C.F.R. Sec. 100.3 and Army Regulation 135-91 were amended to provide that the procedure authorized by 10 U.S.C. Sec. 673a should be applied in *all* cases of unsatisfactory participation.

Petitioner sought to be excused from compliance with Regulation No. 26 of the State of Connecticut Military Department regarding length of hair, asserting that hair longer than that permitted by the Regulation was required in his full time civilian employment. Petitioner submitted to his commanding officer a letter from his employer in support of that request, which letter was never acknowledged.

On eleven occasions between January, 1969 and March, 1969, petitioner was cited by his commanding officer for "unsatisfactory participation" and charged with an unexcused "absence." On each such occasion, petitioner was physically present and in uniform.

On July 1, 1969, petitioner was ordered to report for active duty on August 7, 1969. Petitioner appealed that order and on August 27, 1969, was informed that his appeal had been disapproved and that he was ordered to report for active duty on September 10, 1969.

On August 28, 1969, petitioner instituted an action in the District Court. The jurisdiction of the District Court was invoked under 28 U.S.C. Secs. 1331 and 1343.

Following a hearing, the District Court denied petitioner's motion for a preliminary injunction and granted respondents' motion for summary judgment. That decision was affirmed by the Court of Appeals notwithstanding an approach to the facts of the matter which may fairly be described as sympathetic.

The District Court granted a stay pending appeal to the Court of Appeals. Subsequent to the rendering of its decision, the Court of Appeals granted petitioner's motion to stay the issuance of its mandate pending application to this Court for a writ of certiorari.

Reasons for Granting the Writ

Certiorari should be granted in this case (1) because it involves important questions of constitutional law, statutory interpretation and administrative procedure relating to due process and personal freedom which require settlement by this Court; (2) because it directly and immediately affects a very large number of men in the military Reserve; and (3) because of error by the lower Courts.

I.

Constitutional and Statutory Issues.

The Court is thoroughly familiar by now with the retroactivity and due process argument which petitioner would advance and no purpose would be served by repeating those arguments at length in this petition. However, the petitioner does wish to emphasize that his military service obligation and his substantive rights as a member of the Ready Reserve are governed not only by statute but by a web of federal regulations, Army regulations, executive orders and weekly bulletins which, although they change almost daily, must be read against the uniform background of petitioner's constitutional rights.

In order to give real meaning to petitioner's right to contract, the applicable rules must be limited to those in

existence at the moment of signing his enlistment agreement. Statutes, regulations and policies subsequently amended or enacted must be disregarded to the extent that they would alter or limit substantive rights previously acquired by contract.

One of the fundamental requirements of our legal system is that the sanctions to be imposed for violation of any statute or rule of law should be clearly ascertainable by all persons to whom that rule applies. Where, as here, the applicable rules and regulations are in constant flux, the only tool available for ascertaining the applicable sanction is the constitutionally protected right to contract which gives an individual the power to choose the moment of contracting to fix forever the sanctions which may be applied to punish him in case of a violation of the applicable rules.

While it is true that petitioner's enlistment contract imposes upon him the affirmative duty to "participate satisfactorily" in schedule drills, it is nothing more than semantic sleight of hand to equate purely subjective aesthetic considerations with satisfactory service. This is especially true in the case of a part-time member of the military whose appearance is required by his civilian employment to which he is obligated for 28 out of 30 days each month, the decision of the Second Circuit in *Raderman* v. *Kaine*, 411 F.2d 1102 (CA 2, 1969) to the contrary notwithstanding.

To say, as did both of the lower Courts in this case, that petitioner "could have worn an appropriate wig, thereby complying with military requirements and satisfying the appearance needs of his job," is to evade completely the issue of personal freedom. Neither court specified whether

this gratuitous statement was meant to convey the suggestion that petitioner might retain his long hair and wear a short hair wig to his military exercises, or whether he should cut his hair to satisfy military requirements and wear a long hair wig to his civilian employment. The Connecticut National Guard has explicitly rejected the former interpretation, thereby leaving unanswered the question of the extent to which petitioner's personal freedom may be abridged to satisfy the purely aesthetic requirements imposed by the military.

II.

Persons Affected by Questions Presented.

A further ground for the granting of certiorari in this case is that it directly and immediately affects a substantial number of Reservists not yet on active duty.

According to a National magazine, "(H)air is the perennial, universal protest banner among 600,000 'involuntary' reservists—most of whom endure five and one-half years of weekend drills as a patriotic alternative to getting drafted. They are fiercely civilian 28 days a month. On the 29th, they confront military regimentation with resignation, resentment or mischief." Look magazine, August 12, 1969, page 36 and ff.

The magnitude of the problem created by the fact that the military regulations concerning length of hair have not kept pace with the prevailing style among civilians is amply illustrated by the large number of articles which have appeared in national publications during the last year. In addition to the Look magazine article cited above, articles

have appeared in TIME magazine, September 5, 1969, pp. 43 and 44, and in the NEW YORK TIMES on at least seven occasions since August, 1969.* It is therefore apparent that a substantial number of Reservists have been and will continue to be affected by the application and judicial construction of the policies and regulations referred to in this case.

In addition, it should be noted that the Army's policy regarding long hair is constantly changing and that, according to an Associated Press report carried by local papers on May 31, 1970, "hair on top of the head can now be allowed to reach three inches in length." Thus, it is highly probable that the haircut which the Army found offensive a year ago would today be in complete conformity with Army regulations. There is no better testimony to the large number of men affected by the regulations and policies questioned in this case than the fact that the Army itself is revising its regulations in response to the pressures brought to bear by these large numbers of men.

III.

Errors Below.

The Courts below failed properly to construe the line of cases comprising *Schwartz* v. *Franklin*, 412 F.2d 763 (CA 9, 1969); *Even* v. *Clifford*, 287 F. Supp. 334 (S.D. Cal., 1968); *Winters* v. *U. S.*, 281 F. Supp. 289 (E.D.N.Y., 1968); *Pfile* v. *Corcoran*, 287 F. Supp. 554 (D. Colo., 1968); and *Fox* v. *Brown*, 402 F.2d 837 (CA 2, 1968), in light of this Court's

* August 12, 1969, 24:8; August 23, 1969, 32:4; September 4, 1969, 1:2; September 15, 1969, 52:3; December 10, 1969, 24:1; December 11, 1969, 37:8; February 2, 1970, 2:6, 7.

later decisions in *Breen* v. *Selective Service Local Board No. 16*, 396 U.S. 460, 24 L. Ed.2d 653 (1970) and *Gutknecht* v. *United States*, 396 U.S. 295, 24 L. Ed.2d 532 (1970).

All of the cases cited concede that retroactive application of 10 U.S.C. 673a to Reservists situated similarly to petitioner results in an impairment of constitutionally protected rights. However, in each case the Court found that the impairment was insubstantial inasmuch as activation through Selective Service in accordance with the delinquency regulations would achieve the same or a less salutary result as direct activation. But take away the delinquency regulations, as this Court has done by its decisions in *Breen* and *Gutknecht, supra,* and you have an entirely different result. The Reservist who is reported to Selective Service, in the absence of the delinquency rgulations, is simply stripped of his 1-D deferment and placed in the available manpower pool, to be dealt with in the same manner as any other registrant. That the difference may be substantial may be seen from the decision in *United States ex rel. Caputo* v. *Sharp,* 386 F. Supp. 516 (E.D. Pa., 1968).

CONCLUSION

For the reasons set forth above, this Court should grant certiorari to review the judgments below.

Respectfully submitted,

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Attorney for Petitioner

July , 1970

APPENDIX A

Statutes and Regulations

10 U.S.C. 673a

§ 673a. Ready Reserve: members not assigned to, or participating satisfactorily in, units

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligation; and

(3) has not served on active duty for a total of 24 months.

(b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period.

(c) To achieve fair treatment among members of the Ready Reserve who are being considered for active duty under this section, appropriate consideration shall be given to—

(1) family responsibilities; and

(2) employment necessary to maintain the national health, safety, or interest.

10 U.S.C. 270(b)

(b) A member of the Ready Reserve covered by this section who fails in any year to satisfactorily perform the training duty prescribed in subsection (a), as determined by the Secretary concerned under regulations to be prescribed by the Secretary of Defense, may be ordered without his consent to perform additional active duty for training for not more than 45 days. If the failure occurs during the last year of his required membership in the Ready Reserve, his membership is extended until he performs that additional active duty for training, but not for more than six months.

50 U.S.C. App. 456(2)(A)

(2) (A) Any person, other than a person referred to in subsection (d) of this section, who—

(i) prior to the issuance of orders for him to report for induction; or

(ii) prior to the date scheduled for his induction and pursuant to a proclamation by the Governor of a State to the effect that the authorized strength of any organized unit of the National Guard of that State cannot be maintained by the enlistment or appointment of persons who have not been issued orders to report for induction under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix]; or

(iii) prior to the date scheduled for his induction and pursuant to a determination by the President that the strength of the Ready Reserve of the Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve cannot be maintained by the enlistment or appointment of persons who have not been issued orders to report for induction under

this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix];

enlists or accepts appointment, before attaining the age of 26 years, in the Ready Reserve of any Reserve component of the Armed Forces, the Army National Guard, or the Air National Guard, shall be deferred from training and service under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] so long as he serves satisfactorily as a member of an organized unit of such Reserve or National Guard in accordance with section 270 of title 10 or section 502 of title 32, United States Code, as the case may be, or satisfactorily performs such other Ready Reserve service as may be prescribed by the Secretary of Defense. Enlistments or appointments under subparagraphs (ii) and (iii) of this clause may be accepted notwithstanding the provisions of section 15(d) of this title [section 465(d) of this Appendix]. Notwithstanding the provisions of subsection (h) of this section, no person deferred under this clause who has completed six years of such satisfactory service as a member of the Ready Reserve or National Guard, and who during such service has performed active duty for training with an armed force for not less than four consecutive months, shall be liable for induction for training and service under this Act, except after a declaration of war or national emergency made by the Congress after August 9, 1955. In no event shall the number of enlistments or appointments made under authority of this paragraph in any fiscal year in any Reserve component of the Armed Forces or in the Army National Guard or the Air National Guard cause the personnel strength of such Reserve component or the Army National Guard or the Air National Guard, as the case may be, to exceed the personnel strength for which funds have been made available by the Congress for such fiscal year.

STATE OF CONNECTICUT
MILITARY DEPARTMENT
OFFICE OF THE ADJUTANT GENERAL
STATE ARMORY, HARTFORD, CONN., 06115

18 March 1969

STATE REGULATION
NUMBER 26*

SATISFACTORY PARTICIPATION

1. This regulation provides information and instructions for carrying out the policies and procedures governing satisfactory participation for members of the Army National Guard as required by AR 135-91.

2. Commanders at all echelons should have a thorough knowledge of the regulation to insure that all procedures and actions are followed carefully. It is imperative that all actions required by the regulation be accomplished in a complete and timely manner, immediately following each period of unsatisfactory service or unexcused absence.

3. The following definition of "neat and soldierly appearance" is furnished to assist unit commanders:

a. The face will be kept clean-shaven, but a short, neatly trimmed mustache may be worn. A beard may be worn only when temporarily approved by medical

* This regulation supersedes State Regulation 26, 9 October 1963; State Regulation 26-1, 11 September 1964; letter, Hq First U. S. Army, AHAAG-CA, subject: Compliance with DA Circular 135-10, 7 March 1968, with 1st Indorsement, this Hq, 18 April 1968; and letter, TAG Conn., subject:, Compliance with DA Circular 135-10, 13 June 1968.

officers for medical reasons. Such approval will be limited initially to three months, but may be extended if considered necessary by the medical authorities.

b. Hair must be neat and closely trimmed. It may be clipped at the edges of the sides and back, but must present an evenly graduated appearance. Long and conspicuous sideburns are prohibited. Sideburns must not be longer than to the center of the ear opening and be trimmed in a graduated manner.

c. Articles such as pencils, pens, watch chains, fobs, pins, jewelry, handkerchiefs, combs, cigars, cigarettes, pipes, and sunglasses cases will not be worn or carried exposed on the service uniform. The wearing of wristwatches, identification bracelets, and rings is permitted. Conservative sunglasses may be worn, but not in military formations.

4. This headquarters has prepared a check list to assist commanders (Appendix I), which will not be used in place of the regulation but in conjunction therewith. The check list contains the steps to be followed and the forms to be used.

5. The forms and form letters pertinent to the procedures are contained in appendixes to this regulation.

APPENDIX B

Opinion of the United States Court of Appeals, Second Circuit

No. 768—September Term, 1969.

(Argued May 8, 1970 Decided June 2, 1970.)

Docket No. 34585

FRANK GIANATASIO, JR.,

Plaintiff-Appellant,

—v.—

FIRST LIEUTENANT EAMONN M. WHYTE, Commanding Officer, Company "A" 242nd Engineer Battalion (C) (A) Connarng, Stratford, Connecticut; MAJOR GENERAL E. DONALD WALSH, Adjutant General for the State of Connecticut; LIEUTENANT GENERAL JONATHAN O. SEAMAN, Commanding General, First United States Army, Fort George G. Meade, Maryland; and MAJOR GENERAL WINSTON P. WILSON, Chief National Guard Bureau, Washington, D. C.,

Defendants-Respondents.

Before:

LUMBARD, *Chief Judge,*

WATERMAN, *Circuit Judge,* and JAMESON, *District Judge.**

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* Of the District of Montana, sitting by designation.

Appellant, a member of the Connecticut National Guard who has been ordered into active military service for not participating satisfactorily in his unit at drill, sought to enjoin his induction. The United States District Court for the District of Connecticut, Zampano, *J.*, denied a motion for a preliminary injunction, and, upon appeal, the order below is *Affirmed.*

LAWRENCE P. WEISMAN, Bridgeport, Conn., *for appellant.*

RICHARD P. CRANE, JR., Asst. United States Attorney; Stewart H. Jones, United States Attorney, District of Connecticut, *for defendants-respondents.*

WATERMAN, *Circuit Judge*:

The appellant, Frank Gianatasio, Jr., enlisted in the Connecticut Army National Guard on July 14, 1965, Bastille Day. This fortuitous connection with one of the world's great national holidays commemorating the overthrow of despotic power by non-conformists was of no moment for three and one half years here, until, symbolically, appellant's commanding officer in January and March 1969 concluded on eleven drill occasions when appellant was physically present and ready to participate in drills that appellant's long hair caused him to be guilty of "unsatisfactory participation" in unit drills. It appeared to the citing officer, defendant First Lt. Eamonn M. Whyte, that because Army Regulation 135-91 5(d)(2) requires National Guard members to present a "neat appearance" to the world around them appellant's non-conforming hairdo should be equated with "unsatisfactory participation."

Gianatasio insisted that he did have a really "neat" haircut by any but army standards and argued that long hair was essential to his civilian work. His employer, the manager of the Shoe Bazaar in Westport, Connecticut, wrote the Guard that ". . . since it is now fashionable for men to have long hair and since Frank is now a salesman of fashionable shoes and clothing he could not possibly sway someone toward a look, that with a short haircut, he would appear for all purposes, not to understand." The manager added, "If there are any questions please do not hesitate to call."

First Lieutenant Whyte was not impressed with this reasoning. He did not call or acknowledge the letter but instead, in answer to a later letter, wrote to appellant's employer on March 24, 1969. He stated that "Due to circumstances involved with this man he is now pending action to be inducted into the Army of the United States for a period of two years. This individual is not a conformist as far as the army way of life as he will not apply himself with his obligation to the United States Government."

Appellant appeared before the State Adjutant General on April 24, 1969, and as a result was given a further opportunity to comply with the "neat appearance" regulation. However, Gianatasio's hair was judged unsatisfactory by Lieutenant Whyte on two further occasions after this date, and on July 1, 1969 plaintiff was ordered to report on August 7 for active duty in the Army for a period of 24 months less time already served on active duty. At this point we are constrained to note that the Guard seems not to have considered that appellant's hair impeded him in the performance of military duties, but only that his hair length did not conform to aesthetic requirements. Gianatasio's appeal from this order within the National

Guard failed. Thereupon he instituted this action in the United States District Court for the District of Connecticut for a declaratory judgment that Army Regulation 135-91 and procedures followed pursuant thereto violated the United States Constitution, sought the convening of a statutory three-judge district court, and injunctions reinstating him in the National Guard and preventing his activation. He also claimed damages of $25,000. The defendants moved for summary judgment in their favor. The lower court denied plaintiff's application for a three-judge court and for a preliminary injunction and granted defendants' motion for summary judgment. Gianatasio appeals.

Appellant argues that his order to report for active duty is an arbitrary impairment of his constitutional rights in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution. In his enlistment contract with the National Guard, Gianatasio agreed that "If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction." This contract language was authorized by 50 U.S.C. App. §456(c)(2)(D), which stated that "any person enlisted or appointed after October 4, 1961, in the Ready Reserve of any reserve component of the Armed Forces . . . who fails to serve satisfactorily during his obligated period of service . . . may be selected for training and service and inducted into the armed force of which such reserve component is a part, prior to the selection and induction of other persons liable therefor."

Instead of reporting Gianatasio to the Selective Service System for induction, however, the Guard ordered him

directly into active duty pursuant to 10 U.S.C. §673a,[1] enacted subsequent to appellant's enlistment. Appellant maintains that, even assuming *arguendo* that he was indeed guilty of "unsatisfactory participation," this retroactive application violates his contractual right to be inducted, if he may be inducted at all, through the Selective Service System. This violation, he contends, is highly prejudicial to him for he claims he might have qualified for a deferment if he had been processed through Selective Service, a possibility foreclosed to him by the order to report directly for active duty.

We disagree that appellant would have had an opportunity to qualify for a deferment if he had been processed through his draft board, and we therefore find that the retroactive application of Section 673a did not harm

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1 Section 673a reads:

§673a. Ready Reserve: members not assigned to, or participating satisfactorily in, units.

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligations; and

(3) has not served on active duty for a total of 24 months.

(b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period.

(c) To achieve fair treatment among members of the Ready Reserve who are being considered for active duty under this section, appropriate consideration shall be given to—

(1) family responsibilities; and

(2) employment necessary to maintain the national health, safety, or interest.

appellant in any tangible way. At the time of his enlistment 32 C.F.R. 1631.8 provided, pursuant to 50 U.S.C. App. §456(c)(2)(D), that "any registrant enlisted . . . in the Ready Reserve of any reserve component of the Armed Forces . . . who fails to serve satisfactorily during his obligated period of service as a member of such Ready Reserve . . . as certified by the respective Armed Force, shall be ordered to report for induction by the local board *regardless of the class in which he is classified and without changing his classification.*" (Emphasis supplied.) We have already held, applying this clear language, that "the Local Board's responsibility was solely ministerial, to bring into active service a soldier who had already enlisted and whose reserve status had been terminated; the Regulations as to the right to a hearing with respect to a classification or refusal to reopen one were thus inapplicable." *United States* v. *Lonstein*, 370 F.2d 318, 320 (2 Cir. 1966). Inasmuch as Gianatasio, if he were to be processed through Selective Service, would have no right to reclassification, we do not see what right he lost by being activated through a procedure which bypassed the local draft board.

Appellant contends that this interpretation of Section 456 and our holding in *Lonstein* are now invalid because of *Gutknecht* v. *United States*, 396 U.S. 295 (1970) and *Breen* v. *Selective Service Local Board No. 16*, 396 U.S. 460 (1970). We do not agree. The Supreme Court there held that Congress had not granted the President and the Selective Service System the right to remove a civilian registrant from a deferred classification to punish him for acts meriting criminal punishment under other provisions of federal law. Appellant's situation is quite different

from the situations present in *Gutknecht* and in *Breen*, for Congress specifically provided that induction could follow unsatisfactory performance in the National Guard, and Gianatasio agreed to this congressional provision when he signed his National Guard contract. Appellant does not challenge the fact that this contract is valid and binding. Gutknecht and Breen were civilian draft registrants, not National Guardsmen.

Second, appellant argues that the army regulation implementing 10 U.S.C. §673a contradicts regulations promulgated by the Secretary of Defense, specifically 32 C.F.R. 101.3-101.5. These regulations, however, do not in any way purport to provide exclusive induction procedures which would bar direct orders to report to active duty authorized by 10 U.S.C. §673a. The thrust of appellant's argument, if there is one, eludes us at this point. Moreover, the Government points out that these regulations were supplanted on January 9, 1969 by a new Department of Justice Directive 1215.13, 34 F.R. 130, which specifically authorizes resort to 10 U.S.C. §673a.

Third, appellant argues that his order to active duty constitutes the imposition of a punishment by the Government without the protection of constitutionally required procedural rights, such as counsel, cross-examination, compulsory process, an impartial tribunal, public trial, and others. Appellant cites *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963) and *United States* v. *Brown*, 381 U.S. 437 (1965). Appellant overlooks the fact, however, that he agreed in his enlistment contract to immediate induction into the active service should he "fail to participate satisfactorily" in the National Guard. Even assuming that this contract agreement did not waive any procedural rights which might otherwise have existed without it, Gianatasio

does not intimate that he has actually been injured by the lack of any of these procedures. He does not here contest the fact that his hair is longer than National Guard standards permit, nor does he allege that he would have made such a contention to the Guard in hearings which were not made available to him or were not fairly conducted. He have already held that the military has wide discretion in regulating hair length. See *Raderman* v. *Kaine*, 411 F.2d 1102 (2 Cir. 1969). Therefore, inasmuch as Gianatasio has failed to show or even allege that he might have substantive rights to protect, we fail to see how any hypothetical deprivation of procedural rights can harm him.

Appellant's final argument apparently seeks to have us overrule *Raderman* v. *Kaine*, *supra*, on grounds that the Guard's "neat appearance" rules unjustly deprive him of his right to a livelihood in civilian life. We decline so to rule and note in the words of the court below ". . . that the plaintiff could have worn an appropriate wig, thereby complying with military requirements and satisfying the appearance needs of his job."

Affirmed.

Opinion of the United States District Court, District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 13371

FRANK GIANATASIO, JR.,

Plaintiff,

—v.—

FIRST LIEUTENANT EAMONN M. WHYTE, *et als.*,

Defendants.

Memorandum of Decision

The plaintiff, a National Guard reservist, seeks declaratory and injunctive relief from an order assigning him to involuntary active duty for a period of approximately 18 months in the United States Army.[1]

The basic facts have been stipulated. On July 14, 1965, the plaintiff enlisted in the Connecticut Army National Guard for a period of six years, three months of which were to be active duty and the balance by regular attendance at drills. In the first three months of 1969, the plaintiff was cited by his commanding officer, defendant Whyte, for "unsatisfactory participation" in unit drills by reason of

[1] The plaintiff has withdrawn his charge of libel against defendant Whyte; the plaintiff's motion to convene a three-judge court was denied by this Court on September 23, 1969.

his long hair, which was considered not to comply with Army Regulation 135-91, 5d(2), concerning "neat and soldierly appearance." Plaintiff, supported by a letter from his employer, claims that a certain "modish" appearance was required in his employment as a salesman in a women's shoe salon.

On April 24, 1969, plaintiff appeared before the State Adjutant General who gave him a further opportunity to comply with the relevant regulations pertaining to appearance. Thereafter, on two occasions, plaintiff's commanding officer determined that the length of his hair was still unsatisfactory. Subsequently he was ordered to report for active duty on August 7, 1969, and after a delay during which an appeal was taken, and denied, the plaintiff was given notice to submit to active duty on September 10, 1969. The instant action followed. The plaintiff now requests that a preliminary injunction issue; the defendants move for summary judgment.

The plaintiff claims his active duty order is invalid on three grounds: 1) it constitutes punishment without due process of law; 2) it is a breach of his "contract" with the National Guard, and 3) it deprives him of his constitutionally protected right to retain long hair.

I.

The plaintiff first contends that the decision-making process to activate him is analogous to the accusatory process of a criminal or quasi-criminal proceeding. Due process under these circumstances, he argues, entitles a reservist to the full panoply of procedures and rights accorded a defendant, including the right to counsel, a public trial, and a trial by jury. However, the activation of

a reservist for unsatisfactory performance is far from a criminal prosecution. A more parallel situation would be the classification proceedings before a Selective Service Board wherein a delinquent registrant is not afforded the constitutional rights and privileges of a defendant. *United States* v. *Dicks*, 392 F.2d 524, 528 (4 Cir. 1968).

Various avenues of review are available to the reservist who wishes to challenge his call-up order, see, e.g., 10 U.S.C. § 938, Army Regulation 135-91; due process does not require more. *Raderman* v. *Kaine*, 411 F.2d 1102, 1104 (2 Cir. 1969); *Smith* v. *Resor*, 406 F.2d 141, 147 (2 Cir. 1969); *Kalish* v. *United States*, —— F. Supp. —— (E.D. Mich. 1969). In the instant case, unlike the facts in *Smith* v. *Resor, supra*, there is no evidence that the plaintiff's procedural rights of review under the applicable statutes and military regulations were violated.

II.

Plaintiff further claims that his order to active duty under 10 U.S.C. § 673a is an unconstitutional impairment of the enlistment contract he signed in 1965, which reads in pertinent part:

> If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction.

On October 15, 1966, Congress passed Public Law 89-687, now codified in 10 U.S.C. § 673a, which empowered the President to order reservists whose participation was unsatisfactory to active duty for 24 months less time already

served on active duty. This new law, in effect, added a third procedure available to the Army to activate a delinquent reservist, and is the authority for the order at issue here.

The plaintiff argues "that the sanctions available to punish him for unsatisfactory service are fixed by that contract (signed by him prior to the passage of § 673a) and that to apply 10 U.S.C. § 673a to deprive him of the contractual rights thus acquired" would violate his constitutional rights.

Similar claims have been advanced and rejected in many cases; it is now well-established that the provisions of § 673a may be applied retroactively to activate a reservist who has not performed satisfactorily. See, e.g., *Fox* v. *Brown*, 402 F.2d 837 (2 Cir. 1968), cert. denied, 394 U.S. 938 (1969); *Winters* v. *United States*, 281 F. Supp. 289 (E.D.N.Y.), aff'd mem., 390 F.2d 879 (2 Cir.), cert. denied, 393 U.S. 896 (1968); *Johnson* v. *Powell*, 414 F.2d 1060 (5 Cir. 1969); *Schwartz* v. *Franklin*, 412 F.2d 736 (9 Cir. 1969); *Even* v. *Clifford*, 287 F. Supp. 334 (S.D. Calif. 1968).

Plaintiff relies heavily on the cases of *Harmonson* v. *United States*, —— F. Supp. —— (C.D. Calif. 1969), and *Gion* v. *McNamara*, —— F. Supp. —— (C.D. Calif. 1968). However, the *Harmonson* case was summarily reversed by the Ninth Circuit on July 7, 1969, and the reasoning of the *Gion* case was not accepted by the Court of Appeals for this Circuit in *Fox* v. *Brown, supra*, at 841.

III.

Finally, plaintiff contends that the regulation governing a reservist's appearance is an unconstitutional restraint upon his right to civilian employment. This contention must be rejected on the authority of *Raiderman* v. *Kaine*,

supra. In addition, the Court notes that the plaintiff could have worn an appropriate wig, thereby complying with military requirements and satisfying the appearance needs of his job.

IV.

Accordingly, the plaintiff's motion for a preliminary injunction is denied, and the defendants' motion for summary judgment is granted.

Dated at New Haven, Connecticut, this 12th day of January, 1970.

ROBERT C. ZAMPANO
United States District Judge

Judgment

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 13,371

FRANK GIANATASIO, JR.,

—v.—

FIRST LIEUTENANT EAMONN M. WHYTE, *et als.*

The Court having filed its Memorandum of Decision denying plaintiff's motion for preliminary injunction and granting defendants' motion for summary judgment,

It is Ordered, Adjudged and Decreed that this action is hereby dismissed on the merits and that defendants have their costs of action.

Dated at New Haven, Connecticut, this 14th day of January, 1970.

GILBERT C. EARL
Clerk,
United States District Court

By Frances J. Consiglio
Deputy In Charge

APPENDIX C

Enlistment Agreement

(Age 17 through 25)

Date: 14 July 1965 Place: Stratford, Connecticut

In connection with my enlistment in the Army National Guard of the State of Connecticut and as a Reserve of the Army for service in the Army National Guard of the United States, this date, I hereby agree to and understand that—

I incur a military service obligation of 6 years.

I will participate with my unit in scheduled training effective immediately.

I will enter on active duty for training for a period of approximately 26 weeks (enter time required for training in designated MOS) within 120 days of this date, unless a delay for a longer period is authorized by the Department of the Army. If I am a high school student, I may be delayed in reporting for active duty for training for not more than one year, until I graduate, or until I cease to pursue such course satisfactorily, whichever occurs earlier.

After completing the active duty for training, I will serve in the Ready Reserve for the remainder of my 6 year military service obligation. If for any reason I cannot satisfactorily complete the required training (schooling) in the MOS for which I originally entered on active duty for training, I will be required to accept training of a duration not to exceed 6 months to qualify in an alternate MOS as determined by the Army and/or my unit commander.

During my Ready Reserve service, both before and after my active duty training, I am required to participate satisfactorily in the scheduled drills (at least 48 each year) and attend field training at least 15 days each year, unless excused therefrom by proper authority. Should I be assigned to the Ready Reserve Mobilization Reinforcement Pool during the 6 year period, I will, when directed, perform not more than 30 days active duty for training annually.

I must, prior to moving to another location (town, city, community, state), report any change of address to my unit commander or his representative. Within 30 days after arriving at my new home of residence, I must report to the nearest Army National Guard Armory of U. S. Army Reserve Training Center for instructions and possible assignment. If, prior to this time, I have not performed my initial active duty for training as agreed to above, I realize that, at a time convenient to the service but in any case before I have completed one year of my 6 year military service obligation, I must enter on this active duty for training or 6 months active duty for training as determined by the needs of the service in my new area of residence.

I must reply promptly to any military correspondence directed to me. I further understand that—

If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction.

In the event of war or national emergency declared by Congress my enlistment, which would otherwise expire, will be continued in effect until 6 months after the end of such war or emergency, unless sooner terminated.

Typed first, middle, last name
FRANK GIANATASIO JR.

Signature
FRANK GIANATASIO JR.

Typed name unit commander or authorized representative (witness)
RALPH A. CENNAMO

Signature
RALPH A. CENNAMO

Exhibit A

THE SHOE BAZAAR

Footwear for Men and Women

Office: 829 Lancaster Avenue Bryn Mawr, Pa. 19010

LAwrence 5-4883

To whom it may concern:
RG: Frank Gianatsio Jr.
P.F.C. Co. A. 242nd ENG.
Stratford Armory
Stratford, Conn.

Gentlemen,

Frank has been in my employ for two months and is doing a great job. He has a definite future with our company. Our business is a fashion business and since Frank is now in this line of work he must, to be an effective part of our organization, look and dress accordingly. I respectfully understand proper haircuts are part of the uniform and discipline of the National Guard but since it is now fashion-

able for men to have long hair and since Frank is now a salesman of fashionable shoes and clothing he could not possibly sway someone toward a look, that with a short haircut, he would appear for all purposes, not to understand. Due to the circumstances I would sincerely appreciate your making a concession on his part. Since getting a haircut would hinder Franks earning living and his future in this business. If there are any questions please do not hesitate to call.

Respectfully,

Daniel Tuossoli, Manager

/s/ Daniel Tuossoli
Shoe Bazaar 226-4949
22 Main St.
Wspt., Conn.

was told by
Cpt. Graze to get
Haircut on 6 Oct. 68

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 470

FRANK GIANATASIO, JR., PETITIONER

v.

FIRST LIEUTENANT EAMONN M. WHYTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is not reported. The opinion of the court of appeals (Pet. App. B) is reported at 426 F. 2d 908.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1970. The petition for a writ of certiorari was filed on July 29, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, an enlisted member of the Connecticut Army National Guard, was subject to

408-994 —70

activation pursuant to 10 U.S.C. (Supp. V) 673a for unsatisfactory participation in drills.

2. Whether the courts should review and overturn the determination of petitioner's superior officer that he did not present a neat appearance at National Guard drills.

STATEMENT

Petitioner enlisted in the Connecticut Army National Guard on July 14, 1965.[1] At that time he entered into an enlistment agreement which provided in part as follows (Pet. App. 32):

> If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to Selective Service for immediate induction.

On eleven occasions between January 1969 and March 1969, petitioner was cited by his commanding officer for "unsatisfactory participation" in unit drills by reason of an alleged failure to comply with Army Regulation 135.91 5(d)(2) concerning "neat appearance" because of his long hair. On each such occasion, petitioner was physically present at his unit drills.

By undated letter addressed "To Whom It May Concern" (Pet. App. 33–34), and received by petitioner's commanding officer, petitioner's employer explained the need for petitioner to have "long hair"

[1] Unless otherwise indicated, the statement of facts is based on the stipulation of facts contained in the briefs of both parties filed in the court of appeals and presently on file with the Clerk of this Court.

in his civilian employment and requested that he be excused from compliance with appearance regulations of the National Guard.

On April 24, 1969, petitioner appeared before the State Adjutant General, and, as a result of that appearance, was given a further opportunity to comply with the relevant regulations pertaining to appearance. Thereafter, on two occasions he appeared before his commanding officer who determined that the length of his hair was still unsatisfactory. Petitioner was then informed that his unit was requesting that he be ordered to active duty for a period of 24 months, less time actually served on active duty, by reason of his allegedly "unsatisfactory participation."

On July 1, 1969, petitioner was ordered to report for active duty on August 7, 1969; he appealed and was granted a stay of orders for a period of thirty days. His appeal was disapproved, and on August 27, 1969, he was ordered to report for active duty on September 10, 1969. Petitioner commenced this action for a declaratory judgment and an injunction on September 5, 1969. The district court (Pet. App. 25–29) granted summary judgment against petitioner, and the court of appeals affirmed (Pet. App. 17–24).

ARGUMENT

The decision below is not in conflict with decisions in the other circuits and presents no question which warrants further review of the petition.

1. The courts below properly rejected petitioner's contention that his activation under 10 U.S.C. 673a

violated the terms of his enlistment agreement. This is essentially the same argument that was made and rejected in *Winters* v. *United States*, 281 F. Supp. 289 (E.D. N.Y.), affirmed *per curiam*, 390 F. 2d 879 (C.A. 2), certiorari denied, 393 U.S. 896; *Fox* v. *Brown*, 402 F. 2d 837 (C.A. 2), certiorari denied, 394 U.S. 938; *Karpinski* v. *Resor*, 419 F. 2d 531 (C.A. 3); *Schwartz* v. *Franklin*, 412 F. 2d 736 (C.A. 9); *Winters* v. *United States*, 412 F. 2d 140 (C.A. 9), certiorari denied, 396 U.S. 920.

When petitioner enlisted in the Connecticut Army National Guard he agreed that on failure to perform satisfactorily he could be ordered to active duty for a period of 45 days or be reported to Selective Service for immediate induction. At the time of his enlistment (as at present), the law provided (50 U.S.C. App. 456(c)(2)(D)) that a reservist whose performance of reserve obligations was unsatisfactory would be subject to induction into the Armed Forces on a priority basis by his local draft board. Such induction could be at any time during the six year enlistment; he could be required to serve two full years, with no credit for prior active duty.

Subsequent to petitioner's enlistment 10 U.S.C. 673a became effective, providing additionally that the President may directly activate, for a period of two years less time already spent on active duty, any Ready Reservist who is not "participating satisfactorily". In practical effect (except for the credit for prior service) this provision differs little from the law as it was when petitioner enlisted; in both cases

the reservist is subject to active duty under identical circumstances.[2] See *Winters* v. *United States, supra,* 281 F. Supp. at 292. Thus, direct activation in this case was not outside the intended scope of the enlistment agreement.

This Court's decisions in *Breen* v. *Selective Service Board,* 396 U.S. 460, and *Gutknecht* v. *United States,* 396 U.S. 295, are inapposite here. Those decisions involved the question whether the Selective Service statute provided necessary authorization for priority induction of delinquent registrants. In the instant case, however, such statutory authorization is not at issue; Congress, under its broad constitutional powers to raise and support armies (Art. 1, Sec. 8), has enacted specific legislation for the activation of reservists who unsatisfactorily perform their duties.

2. The contention that activation unjustly deprived petitioner of his right to a livelihood in civilian life is not persuasive. Congress has determined that all young men are liable for military service and, in order to fulfill his military duty, petitioner voluntarily enlisted in the National Guard. It is, of course, well known that the military insists that its members maintain a certain uniform appearance and petitioner assumed the burden

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[2] Activation by Selective Service would give petitioner no greater procedural rights than he has under 10 U.S.C. 673a. Under 50 U.S.C. App. 456(c)(2)(D) the reservist is ordered to report for priority induction "regardless of the class in which he is classified and without changing his classification." 32 C.F.R. 1631.8. Accordingly, claims to exempt or deferred status would not be entertained by his local board in these circumstances.

imposed by this requirement when he voluntarily enlisted. His activation for failing to continue to meet this requirement was not unjustified. See *Raderman* v. *Kaine*, 411 F. 2d 1102 (C.A. 2); *Byrne* v. *Resor*, 412 F. 2d 774 (C.A. 3); Army Regulation 135–91; Connecticut State Regulation Number 26 (Pet. App. 14). From his enlistment in the National Guard, the petitioner derived clear benefits. He should be held to the burdens which are inherent in military service. Nor should federal courts assume the task of reviewing the military's determination as to what constitutes the neat appearance required of enlisted men. See *Orloff* v. *Willoughby*, 345 U.S. 83.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
ROBERT V. ZENER,
REED JOHNSTON, JR.,
Attorneys.

NOVEMBER 1970.

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*As both courts below noted, petitioner, by the purchase of a wig, could have easily conformed his military obligation with the asserted needs of his civilian occupation (Pet. App. 24, 29).

U.S. GOVERNMENT PRINTING OFFICE: 1970

Appendix No. IX

THE UNITED STATES OF AMERICA,

To all to whom these presents shall come, Greeting:

WHEREAS, an Order of the authorized officer of the Bureau of Indian Affairs is now deposited in the Bureau of Land Management, directing that according to the provisions of the Act of August 27, 1954 (68 Stat. 868), a fee simple patent issue to Elizabeth C. Bumgarner, for the following described land:

Uintah Meridian, Utah.

T. 4 S., R. 11 W.,
Sec. 13, All;
Sec. 14, All;
Sec. 23, All;
Sec. 24, All;
Sec. 26, All.

The area described contains 3,200 acres, according to the Offical Plat of the Survey of the said Land, on file in the Bureau of Land Management:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said Elizabeth C. Bumgarner, and to her heirs, the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Elizabeth C. Bumgarner, and to her heirs and assigns forever.

This patent is issued subject to the reservation of all oil, gas and other minerals to the United States in trust for the beneficial owners thereof, their heirs and assigns.

Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members of the full-blood and mixed blood groups of the Ute Indian Tribe of the Uintah and Ouray Reservation in accordance with regulations now or hereafter prescribed by the Secretary of the Interior pursuant to the Act of August 27, 1954 (68 Stat. 868). This provision shall also apply to any successor in interest of such grantee who is also a member of the mixed-blood group as defined in the act, it being the intention of this provision to effectuate the purpose of section 15 thereof.

The property herein conveyed shall be exempt from property taxes for a period of seven years from August 27, 1954, as provided in the Act of August 27, 1954 (68 Stat. 868), as amended August 2, 1956 (70 Stat. 936), unless the original grantee herein parts with title thereto, either by deed, descent succession, foreclosure of mortgage, sheriff's sale or other conveyance: Provided, that the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of Section 17 of said Act.

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of

June 17, 1948 (62 Stat., 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the Twentieth day of September in the year of our Lord one thousand nine hundred and sixty and of the Independence of the United States the one hundred and eighty-fifth.

For the Director, Bureau of Land Management.

By Ruth W. Talley
Chief, Patents Section

Patent Number 1212876
(Seal)

Appendix No. X

.... CHECK FACIMILE HERE ....

NOTICE OF OFFER TO SELL AND ACCEPTANCE THEREOF

Re: Offer to Sell by Elizabeth C. Bumgarner, M.B. No. 30, dated October 28, 1959 and amended November 11, 1960, as construed in Ute Indian Tribe of the Uintah and Ouray Reservation vs. Probst, Docket Nos. 125 and 126-69, Tenth Circuit Court of Appeals, concerning the following described real property:

All of Sections 13, 14, 23, 24 and 26 in Township 4 South, Range 11 West, U.S.B. and M., containing 3,200 acres, more or less. Subject to reservation in the United States of all minerals and mineral rights.

Including all water rights and other appurtenances thereto.

ACCEPTANCE OF OFFER TO SELL

The purchaser accepts the Offer to Sell the above-described property on the terms and conditions set forth

in the Offer To Sell and pay the seller the sum of $35,000.00, plus interest thereon from October 28, 1959, to November 11, 1960 in the amount of $2,180.64, representing a total sum of $37,180.64.

Date: July 6, 1970

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH

By Preston V. Allen
Purchaser
320 Kearns Building
Salt Lake City, Utah 84101

Note: Failure to submit a deposit of not less than 10% of the amount offered shall be cause for rejection of the offer.

RESOLUTION

Anita Reyos, Secretary of Affiliated Ute Citizens of the State of Utah, does hereby certify that the following resolution was adopted by the Board of Directors of said association at a meeting duly held on July 3, 1970:

> RESOLVED, that the President of the association, Preston Allen, is hereby authorized to execute appropriate documents on behalf of AUC accepting the offer of Parley Probst for the purchase of the lands described in the Probst case and the Treasurer of the association, Joseph A. Workman, is authorized to sign a check on the account of AUC in the amount of $37,180.64, or such lesser amount as is presently on deposit, for the acceptance of the Probst offer.

Mrs. Anita Reyos
Secretary

NOTICE

TO: The Superintendent of the Uintah and Ouray Reservation; The Ute Indian Tribe and its legal counsel; Parley Probst and his legal counsel; the United States Bureau of Reclamation; and Whomever may be concerned

1. The following described land was purchased by Elizabeth C. Bumgarner, M.B. No. 30, pursuant to the provisions of Public Law 83-671:

> All of Sections 13, 14, 23, 24, and 26 in Township 4 South, Range 11 West, U.S.B. and M., containing 3,200 acres more or less. Subject to reservation in the United States of all minerals and mineral rights.
>
> Including all water rights and other appurtenances thereto.

At all times prior to August 27, 1964, said land was subject to the restrictions and conditions of Public Law 83-671.

2. On or about October 28, 1959, Elizabeth C. Bumgarner offered to sell said lands to Parley Probst, which offer was amended on or about November 11, 1960, and provided for a purchase price of $35,000.00.

3. 25 U.S.C. 677n provides that in the event a member of the mixed-blood group determined to dispose of any real property acquired under Public Law 83-671 prior to August 27, 1964 "he shall first offer it to the members of the Tribe." 25 C.F.R. 243.6 provides that in the event of an offer to sell, the Superintendent of the Uintah and Ouray Reservation must notify the mixed-blood "corporations . . . and the tribe." The Court

in *Ute Indian Tribe v. Probst*, 125 and 126-69 (Tenth Circuit Court of Appeals), held that the requirement of notice to the Tribe, together with the doctrine that "what the members of the Tribe can do individually they can do collectively," resulted in a statutory right of first refusal in the Tribe which could be exercised within a reasonable period of time.

4. As of October 28, 1959, and November 11, 1960, when the Bumgarner-Probst offer was made, the rights of Affiliated Ute Citizens of the State of Utah and the Ute Indian Tribe to act for and on behalf of their Indian members was exactly the same, based upon the same statutory provisions, and remains the same at the present time. Affiliated Ute Citizens of the State of Utah is also an organization of "members of the tribe" which may act collectively, and whose members were also entitled to notice of any offer to sell under 25 C.F.R. 243.6.

5. The mandate in said *Probst* case was returned to the United States District Court for the District of Utah on July 6, 1970.

6. Affiliated Ute Citizens of the State of Utah was not a party to said *Probst* case, although it sought to intervene therein, which request was objected to by the attorney for the Tribe and denied. Accordingly, said *Probst* case does not bind Affiliated Ute Citizens of the State of Utah nor are any of its rights under Public Law 83-671 concluded by said *Probst* case.

7. Affiliated Ute Citizens of the State of Utah has elected to accept the Bumgarner-Probst offer, and attaches hereto a copy of its acceptance of the offer to-

gether with its certified check covering 10% of the purchase price of $35,000.00 plus interest during the period October 28, 1959 and November 11, 1960, in accordance with the regulations established under Public Law 83-671.

8. The original of each of said instruments is submitted to the Superintendent of the Uintah and Ouray Reservation, in accordance with the provisions of Public Law 83-671 and the regulations thereunder. Affiliated Ute Citizens hereby requests that said Superintendent issue his notification of the acceptance of said offer to Parley Probst or any other persons who may be interested. In the event that there is more than one acceptance of said offer, Affiliated Ute Citizens of the State of Utah hereby requests said Superintendent to notify each of said offerors to submit sealed bids in accordance with 25 C.F.R. 243.7, and in accordance with the procedures established under Public Law 83-671.

Dated this 6th day of July, 1970.

Parker M. Nielson
Attorney for Affiliated Ute Citizens
320 Kearns Building
Salt Lake City, Utah

Subscribed and sworn to before me this 6th day of July, 1970.

(Indistinguishable)
Notary Public
Residing in Salt Lake City, Utah

My Commission Expires:
July 6, 1973

Appendix No. X1

25 U.S.C. § 677. Purpose

"The purpose of sections 677-677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property."

25 U.S.C. § 677(a). Definitions

"For the purposes of sections 677-677aa of this title—

(a) 'Tribe' means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah.

(b) 'Full-blood' means a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice under the provisions of section 677e of this title.

(c) 'Mixed-blood' means a member of the tribe who does not possess sufficient Indian or Ute Indian blood to fall within the full-blood class as herein defined, and those who become mixed-bloods by choice under the provisions of section 677e of this title.

(d) 'Secretary' means Secretary of the Interior.

(e) 'Superintendent' means the Superintendent of the Uintah and Ouray Reservation, Utah.

(f) "Asset" means any property of the tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe, or subject to a restriction against alienation imposed by the United States.

(g) "Adult" means a member of the tribe who has attained the age of twenty-one years.

25 U.S.C. § 677(aa): Procedure by Secretary upon non-agreement between mixed-blood and full-blood groups.

"Whenever any action pursuant to the provisions of sections 677-677aa of this title requires the agreement of the mixed-blood and full-blood groups and such agreement cannot be reached, the Secretary is authorized to proceed in any manner deemed by him to be in the best interests of both groups."

25 U.S.C. § 677f(5)

"(5) Sale of any portion of the assets of said group subject to the approval of the Secretary. In addition to the sales herein otherwise authorized, authority is granted to the authorized representatives of said group to sell any property of said group when, in the opinion of the majority of said mixed-blood group, a practicable partition cannot be made, or for any other reason it is deemed to the best interests of the group, and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group, after deducting reasonable cost of sale and distribution."

25 U.S.C. § 677n. Disposal by mixed-blood members of their individual interests in tribal assets: requisites and conditions

"Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to

termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period."

Appendix No. XII

25 C.F.R. § 121.12

"Prior to making or approving a sale, exchange, or gift of trust or restricted land, an appraisal shall be made indicating the fair market value of such land. If the highest bid received at an advertised sale is less than the appraised value, the bid may be accepted with the consent of the owner(s) if the bid approximates the appraised value and is, in the judgment of the secretary, the highest price that may be realized in the circumstances."

25 C.F.R. § 121.61

"The commissioner of Indian affairs or his authorized representative may approve mortgages or deeds of trust on any individually owned trust or restricted land whenever such lands under any law or treaty may be sold with the approval of the Secretary of the Interior or his duly authorized representative. The approval of such a mortgage or deed of trust terminates the trust or restricted status of the land only with the respect to such mortgage or deed of trust and only for the purpose of permitting foreclosure or sale pursuant to the terms of the mortgage or deed of trust in accordance with the laws of the state or territory in which the land is situated."

25 C.F.R. § 243.2 Definitions

"As used in this part:

(a) 'Full-blood member' means each person whose name appears on the final roll of full-blood members as published in the Federal Register on April 5, 1956 (21 F.R. 66), and such other persons as may be admitted to membership in the

tribe after August 27, 1954, in the manner provided in the constitution and bylaws of the tribe.

(b) 'Mixed-blood member' means each person whose name appears on the final roll of mixed-blood members as published in the Federal Register on April 5, 1956 (21 F.R. 66).

(c) 'Member of the tribe' means all mixed-blood and full-blood members as defined in paragraphs (a) and (b) of this section.

(d) 'The corporations' means: (1) Ute Distribution Corporation, a Utah Corporation; (2) Antelope-Sheep Range Company, a Utah Corporation; (3) Rock Creek Cattle Range Company, a Utah Corporation."

(e) 'The Act' means the Act of August 27, 1954 (68 Stat. 868-878; 25 U.S.C. 677-677aa).

(f) 'Tribe' means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah.

(g) 'Real Property' means any interest in land set apart to the mixed-blood group and thereafter acquired by mixed-blood members under the terms of the Act, and does not include lands described in section 9 of the Act (25 U.S.C. 677h).

(h) 'Termination of Federal supervision' means termination of Federal supervision over the particular real estate involved by the issuance of a patent in fee or other similar title document, and does not mean termination of the wardship relationship between the Indian and the United States on the occasion of the issuance of a so-called 'Termination Proclamation.'"

25 C.F.R. § 243.3 Disposal of interests prior to termination of Federal supervision.

"Any mixed-blood member may dispose of his interest in any real property, as herein defined, after having first offered to the members of the

tribe an opportunity to meet his sales price or to meet the highest acceptable bona fide offer received by him. The offer shall be made in accordance with the procedures set forth in §§ 243.5 through 243.10 of this Part 243, and, as far as practicable, with the methods of sales set forth in Part 121 of this chapter. Any contract for the sale of such property to be valid must be approved by the Secretary of the Interior or his authorized representative. The requirement of secretarial approval shall no longer be applicable after termination of Federal supervision, as herein defined."

25 C.F.R. § 243.4 Disposal of interest subsequent to termination of Federal supervision.

"Subsequent to the termination of Federal supervision over the property of a mixed-blood member, as herein defined, and before August 27, 1964, any mixed-blood member may dispose of his interest in any real property, as herein defined, after having provided members of the tribe with an opportunity to meet his sales price or meet the highest bona fide offer received by him, which opportunity shall be referred to as a right of first refusal in members of the tribe. This shall be a covenant running with the land as to all mixed-blood members and shall be set forth in each deed or other instrument of conveyance in the following language:

Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members of the full-blood and mixed-blood groups of the Ute Indian Tribe of the Uintah and Ouray Reservation in accordance with regulations now or hereafter prescribed by the Secretary of the Interior pursuant to the Act of August 27, 1954 (68 Stat. 868). This provision shall also apply to any successor in interest of

such grantee who is also a member of the mixed-blood group as defined in the act, it being the intention of this provision to effectuate the purpose of section 15 thereof."

25 C.F.R. § 243.5 Offer.

"Any mixed-blood member of the tribe desiring to dispose of his interest in real property, as herein defined, prior to termination of Federal supervision over such property, must notify the Superintendent of his desire to dispose thereof, and shall state the price and terms upon which the land is offered for sale or which constitute a bona fide offer to purchase."

25 C.F.R. § 243.6 Notice of offer.

"The Superintendent shall notify in writing the corporations and the tribal business committee of the tribe of any offer of sale, and shall post notices of the offer of sale in a conspicuous place in the Uintah and Ouray Agency Office at Fort Duchesne and in the Post Offices of the towns of Roosevelt, Whiterocks, Randelett, Myton, and Fort Duchesne, Utah, for a period of at least ten days. The notices shall specifically describe the terms upon which such sale is to be made and the final date for acceptance of offer from members of the tribe by submission of an appropriate bid."

25 C.F.R. § 243.7 Acceptance of offer.

"Upon receipt of an acceptance of the offering from any member of the tribe to purchase such land, the Superintendent shall immediately notify the mixed-blood member making the offer to sell such land and the sale may be completed in accordance with the offer and acceptance. In the event two or more members of the tribe submit an acceptance of the seller's offer, the Superintendent shall call for sealed bids from the parties sub-

mitting such acceptances and the sale shall be made to the highest bidder provided the highest bid equals or exceeds the seller's offering price.

25 C.F.R. § 243.11 Sales by corporation.

"In the event any of the corporations determine to dispose of any of the land acquired under the provisions of the Act, at any time prior to August 27, 1964, such corporation shall first offer the land to the members of the tribe in accordance with procedures set forth in §§ 243.5 through 243.10."

25 C.F.R. § 243.12 Sale of stock in the corporations.

"In the event any stockholder of the corporation determines to sell or dispose of any stock owned by him in any of the corporations prior to August 27, 1964, he shall first offer it to the members of the tribe in accordance with the provisions set forth in the Articles of Incorporation and in the certificate of stock of such corporation and in the manner provided in §§ 243.5 through 243.10, as far as practicable."

Appendix No. XIII

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ANITA REYOS, et al,

Plaintiffs, Appellees and Cross-Appellants,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants, Appellants, and Cross-Appellees.

No. 40-69
No. 41-69
No. 42-69
No. 43-69
No. 44-69

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JUNE 1970 TERM

ANITA REYOS, et al,

Plaintiffs, Appellees, and Cross-Appellants,

vs.

No. 40-69

UNITED STATES OF AMERICA, et al.

Defendants, Appellants, and Cross-Appellees.

ANITA REYOS, et al.,
Plaintiffs, Appellees and Cross-Appellants,

vs.

FRED BURSON, et al.,
Plaintiffs-Appellants,

No. 41-69

ANITA REYOS, et al.,
Plaintiffs, Appellees and Cross-Appellants,

vs.

JOHN B. GALE, et al.,
Defendants-Appellants,

No. 42-69

ANITA REYOS, et al.,
Plaintiffs, Appellees and Cross-Appellants,

vs.

VERL HASLEM, et al.,
Defendants-Appellants,

No. 43-69

ANITA REYOS, et al.,
Plaintiffs, Appellees and Cross-Appellants,

vs.

FIRST SECURITY BANK OF UTAH, N.A., a banking corporation of the State of Utah, et al.,
Defendants-Appellants,

No. 44-69

Appeal from the United States District Court For The District of Utah, Central Division (District Court No. C-39-65).

Edmund B. Clark, Attorney, Department of Justice, Washington, D.C. (Shiro Kashiwa, Assistant Attorney General, Washington, D.C., William T. Thurman,

United States Attorney, and H. Ralph Klemm, Assistant United States Attorney, Salt Lake City, Utah, and Roger P. Marquis, Attorney, Department of Justice, Washington, D.C., with him on the Brief), for Appellant, United States of America.

Richard C. Cahoon, Salt Lake City, Utah (Thomas R. Blonquist of Burton, Blonquist, Cahoon, Matheson & Shaffer, Salt Lake City, Utah, with him on the Brief), for Appellant, John B. Gale.

Hardin A. Whitney, Jr., Salt Lake City, Utah (O. Wood Moyle III, Salt Lake City, Utah, with him on the Brief), for Appellant, Verl Haslem.

Marvin J. Bertoch, Salt Lake City, Utah (Merlin O. Baker, of Ray, Quinney & Nebeker, Salt Lake City, Utah, with him on the Brief), for Appellant, First Security Bank of Utah, N.A.

Parker M. Nielson, Salt Lake City, Utah (Adam M. Duncan, Salt Lake City, Utah, with him on the Brief), for Appellees, Anita Reyos et al.

Before LEWIS, Chief Judge, SETH, Circuit Judge, and BRATTON, District Judge.

SETH, Circuit Judge.

These suits were commenced by eighty-five individuals with whom the United States originally had full trust relationship as Indians of the Tribe of the Uintah and Ouray Reservation in Utah. Of this group of plaintiffs twelve individuals were selected by the parties as the ones whose cases would be tried first as test cases. These are referred to as the "designated" plaintiffs and are the appellees herein.

An Act of Congress directed that the federal trust relationship with the mixed-bloods of the Tribe be ter-

minated, and the tribal property be divided between the mixed-blood and the full-blood groups. This is referred to as "termination." All *plaintiffs* belonged to the group of some 490 individuals designated by statute as the *mixed-bloods* of the Tribe.

The termination statute (68 Stat. 868, 25 U.S.C. §§ 677-677aa) permitted the mixed-blood group *to form associations or corporations* to handle some of the property difficult or impossible to distribute to individuals which was allocated to the mixed-blood group, and for matters of general concern to this group. One such corporation so formed was the Ute Distribution Corporation, the stock of which and the stockholders are concerned in these suits.

One type of property which the termination statute stated was not to be distributed to individuals was the gas, oil and mineral interests. Upon division of the tribal property, a portion thereof in undivided interests was allocated to the mixed-blood group. The Ute Distribution Corporation was organized to "handle" this interest of the mixed-bloods jointly with the Tribal Committee which had authority over the full-bloods' share. It was also organized to distribute the group's portion of unliquidated claims against the United States.

Ten shares of stock in the UDC were issued to each person in the mixed-blood group, and distributions or dividends were paid to the stockholders from time to time. The defendant bank entered into a contract with this corporation to act as transfer agent and to provide to it some record keeping and related services. In addition, the bank, under the termination statute, was au-

thorized to act as trustee of express trusts for mixed-bloods who, in the opinion of the Secretary of the Interior, needed such help.

The individual defendants Gale and Haslem were assistant managers of a facility of the bank located in an area where a number of the mixed-bloods lived, and who dealt directly with some of the plaintiffs in the sale or transfer of their stock.

The plaintiffs were stockholders of the UDC who sold shares of their stock to non-Indians. The bank facilities and services were used in connection with these sales or some of them. The causes of action against the bank allege a breach of the bank's duty arising from the agreement with the UDC and from its participation in the sales of stock. The action against the bank is also based on Regulation 10b-5 of the Securities and Exchange Commission. The causes alleged against the individual defendants Gale and Haslem are based solely on this Regulation.

Some time after these suits were filed the complaints were amended to include a cause of action against the United States under the Tort Claims Act. This cause alleged a breach of duty by the Secretary of the Interior and the local officials of the Bureau of Indian Affairs in connection with the transfer of the shares of stock.

The trial court, in some one hundred pages of findings and conclusions, found the defendant bank and defendants Gale and Haslem liable for damages to each of the twelve plaintiffs whose cases were selected as test cases for all sales made by them. The United

States was found liable only as to some of the plaintiffs. The trial court used the figure of $1500 per share as a value for computing damages.

All defendants have appealed from the judgment of the trial court, and the twelve designated plaintiffs, whose cases were tried, have cross-appealed on the ground that the damages were inadequate.

Liability of the United States Under the Tort Claims Act:

The position or status of the plaintiffs as related to the provisions and the execution of the termination statute has become one of the fundamental issues on this appeal. The statute, Public Law No. 83-671 (25 U.S.C. §§ 677-677aa), provides solely and expressly for the termination of the federal trust relationship to the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, and for termination of federal supervision over the trust and restricted property of the mixed-blood members of the Tribe. It directs that there be made a division of the tribal property between the mixed-blood and the full-blood members, and provides the procedure for termination of the mixed-bloods.

As examination of the significant portions of the statute is necessary for a proper consideration of the issues. The statute provides for the preparation of membership rolls for each group and the partition and distribution of the tribal assets between the two groups. *It also states that upon distribution of the divisible property to the mixed-blood members, federal supervision of such member and his property shall thereby*

be terminated except as to property not susceptible of practical distribution such as oil, gas, and mineral rights which shall remain subject to the provisions of the Termination Act. Upon termination the mixed-blood individuals shall not be entitled to the services performed by the Government for Indians; that statutes of the United States which affect Indians because of their status shall no longer be applicable to such persons, and that the laws of the several States shall apply to the said members in the same manner as to other citizens within the State. The statute further states that the Secretary shall " . . . protect the rights of members of the tribe who are minors, non compos mentis, or, in the opinion of the Secretary, in the need of assistance in conducting their affairs, by such means as he may deem adequate, . . . " Provision is made for the mixed-blood members of the Tribe to organize for common purposes and adopt a constitution and bylaws. The Act specifically recites that corporations may be formed by the mixed-bloods for grazing of livestock, for the "handling" of water and water rights, and that distribution of property may be made to such corporations.

As to gas, oil, and mineral rights in the Ute lands, provision is made that these interests be held in undivided shares by the full-blood members on the one hand, and by the mixed-blood group on the other hand. The Act contemplates that an organization be formed by the mixed-blood group for the purpose of empowering individuals to act as "the authorized representatives of said mixed-blood group in the joint management with the tribe and in the distribution and

(sic) [of] unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind. . . . " As indicated in the foregoing sentence provision is made in the Act for the joint management of the gas, oil, and other mineral rights by the Tribal Business Committee and the "authorized representatives" of the mixed-blood group. The Act directs that the net proceeds therefrom after deducting the cost chargeable to such management shall be divided between the full-blood and the mixed-blood groups in proportion to their respective numbers on the final membership rolls.

The statute directs that at a stated time the Secretary of the Interior *issue a proclamation that the federal trust relationship is terminated. This proclamation was so issued on the 26th day of August*, 1961, following the distribution of the property to the mixed-blood members excepting the oil, gas, and minerals as contemplated by the statute.

The mixed-bloods formed a corporation in 1956, the Ute Distribution Corporation (UDC), and 4900 shares of stock were issued. Each mixed-blood received ten shares. The corporate charter recites that it was formed to "manage jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe" the gas, oil, and mineral rights in common ownership and unliquidated claims against the United States. This was the undistributed property and legal title remained in the United States. The Secretary of the Interior acquiesced in the formation of the corporation, and approved the Articles of Incorporation. The transfer of shares in this corporation by the plain-

tiff mixed-bloods to non-Indians gave rise to this litigation. The defendant bank became the transfer agent for the transfer of shares of UDC stock. Distributions to UDC shareholders of receipts from mineral leasing were made from time to time.

Of particular significance to the issues on this appeal is a provision in the termination statute giving the right to the mixed-blood members to dispose of property they received by distribution. This section states:

> "Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period." (25 U.S.C. § 677n).

See also the Secretary's Regulations at 25 C.F.R. § 243.8.

The essential elements of the quoted section were incorporated in the Articles of Incorporation of the Ute Distribution Corporation to govern the sale of the corporate shares. Thus in the event that a stockholder

of the Ute Distribution Corporation desired to sell his stock before August 27, 1964, it was necessary that it first be offered for sale at a stated price to the Tribe or to the members of the Tribe. The procedures and the documents necessary to carry out this provision were arranged for and agreed upon by the local representative of the Bureau of Indian Affairs, by the defendant bank as transfer agent, and by the UDC.

Much of the testimony during the trial concerned the execution and delivery of various documents which were required to carry out this requirement of the corporate charter. *This provision can best be referred to as a right of refusal in the members of the Tribe or the Tribe. It expired on August 27, 1964.*

As indicated above, the trial court determined that the United States was liable to the plaintiffs under the Tort Claims Act by reason of a breach of duty in connection with the plaintiffs' sale of their shares of stock in the UDC. *This is based on a conclusion that a residual wardship or trust relationship existing between the United States and the plaintiffs survived the statutory termination procedures.* The trial court found that the United States had a duty to discourage and to prevent "inconsiderate," "improper," "illegal," and "improvident" sales by the plaintiffs to non-Indians. The court further found that if the United States had prevented irregularities in connection with such sales, "... said sales would not have been made, and that the sales of their stock by the designated plaintiffs was the proximate result of the failure of the United States ... to use reasonable care." The court also determined that the United States had reasonable cause to know

that the plaintiffs were being imposed upon and that the other defendants were acting improperly. Thus the court held that the negligence of the United States was the proximate cause of the sale of the stock by the plaintiffs.

In its findings and conclusions the trial court does not refer to any particular source of the Government's duty other than the statement that "limited aspects of the federal trust relationship continued until the later date [August 27, 1964], with respect to the restrictions governing the alienation of the stock in the Ute Distribution Corporation," and that under "such continuing duties," it was obligated to discourage and prevent improper and improvident sales. It would thus appear that the court found the limited trust-relationship to continue by reason of the right of refusal which was held by the members of the Tribe or the Tribe and applicable to sales of the corporate stock.

The plaintiffs in this appeal urge that some continuation of the supervision or wardship giving rise to a duty on the part of the United States resulted from the right of refusal. Plaintiffs refer to the provision as a "restriction on property."

We must hold that the trial court was in error in this respect. The provision in the Articles of Incorporation that if the stock was to be *sold before August 27, 1964, it should first be offered to "members of the Tribe," constitutes no more than a typical right of refusal in the members of the Tribe or in the Tribe.* It was somewhat more difficult to carry out by reason of the fact that notice had to be given to a fairly large

number of individuals and provision had to be made to advise the prospective seller that his offer had or had not been accepted by the members of the Tribe. This the Bureau of Indian Affairs undertook to do. It was also necessary if an offer was not accepted, and the prospective seller completed the sale to a stranger, to demonstrate to the Tribe or its members that the sale was in accordance with the offer made to them. This was done by an affidavit executed by the seller stating the sales price received. Other than these complications the provision is a commonplace one.

Considerable argument is presented as to whether or not the mixed-bloods were members of the Tribe for the purpose of the right of refusal or whether the right was in the Tribe as such or in the members, but this need not be decided for it is clear that the *plaintiffs themselves had no rights under the right of refusal.* For a discussion of this point see Ute Indian Tribe of the Uintah and Ouray Reservation v. Probst, Tenth Circuit, Nos. 125-69 and 126-69, April 20, 1969, ... F.2d .... (10th Cir.). *The shareholder who was here proposing to sell his stock cannot be considered to be within the group in which the right vested.* The right was granted clearly to permit the members of the Tribe, the Tribe, or the full-blood members to have the first right to purchase property which was about to be sold to an outsider. This provision was for their benefit in an economic and practical way, and if any purchase was to be made, the members of the Tribe or the Tribe had to do it. The record shows that the Tribe considered purchasing UDC shares when offered, but did not do so nor did any individuals in the Tribe. *The*

right of refusal did not create any "restricted property" in the shares as the term is generally used.

The right of refusal thus created no duty on the part of the Government to the then terminated mixed-blood plaintiffs who were seeking to sell their shares of stock. Likewise the procedures and documents devised to carry out the right of refusal and their execution and delivery created no such duty on the part of the United States to the plaintiffs. *The statute expressly provides for termination of the Government's relationship with the individual mixed-bloods. The provisions are clear and the termination was accomplished and is final.* It is clearly within the power of Congress and no one else to provide for such an end to the relationship between these individuals and the Government. United States v. Waller, 243 U.S. 452; United States v. Nice, 241 U.S. 591; Tiger v. Western Investment Co., 221 U.S. 286. *It is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination.*

There is not an abundance of authority on the application of termination statutes; however, the court in Crain v. First National Bank of Oregon, 324 F.2d 532 (9th Cir.), considered the Termination Act relating to the Klamath Tribe. There the court considered determinations made by the Secretary to create express trusts for those "in need of assistance in conducting their affairs," and the effectiveness thereof after termination. The court held that termination was complete except as to the express trusts, and recognized the power of Congress to provide the how, when, and extent of

termination. The plaintiffs here urge that the Crain case holds that there continues some trust relationship with all the termination members. Crain holds that where express trust exists, the individuals under such trusts cannot complain that their property is in trust while others may have received theirs outright. We are not concerned in the case before us with the property of individuals under express trusts. See also Menominee Tribe v. United States, 391 U.S. 404, and Klamath and Modoc Tribes v. Maison, 338 F.2d 620 (9th Cir.).

The trial court was thus in error in concluding that "limited aspects of the federal trust relationship continued," or that any form of wardship continued, and thus that some duty on the part of the Government to the plaintiffs continued after termination in connection with their sales of UDC stock. There being no duty the trial court was in error in awarding damages against the United States under the Tort Claims Act.

Position of Defendant Bank Under its Contract With The UDC:

The legal relationships and the business relationships between the plaintiffs and the defendant bank, and with the Ute Distribution Corporation were determined basically and initially by the contract which had been entered into between the bank and the UDC. This agreement was modified somewhat from time to time in practice. The contract was entered into in 1958, but the principal issues with which we are concerned took place in the years 1963, 1964, and 1965.

The principal purpose of the contract between the bank and the UDC was to have the bank provide stock

transfer services, to do the corporate record keeping, the corporate accounting, and handle distributions or dividends . . .

Of particular consequence in this case was the provision that the bank would act as stock transfer agent for the corporation, and would also assist the corporation in the conduct of its business. The record indicates that it was expected that the bank in the performance of its duties would also accommodate or provide stock transfer services for the individual stockholders of the corporation. This was demonstrated by the fact that the bank was to provide facilities and personnel at Roosevelt, Utah, in an area where many mixed-bloods resided, in order to accommodate transfers of stock. The trial court found that the Roosevelt office of the bank was maintained in part " . . . for the purpose of facilitating and assisting mixed-bloods in the transfer of Ute Distribution Corporation stock . . . . "

It is apparent that the transfers of stock of this particular corporation would be somewhat complicated by the existence of the *right of refusal* in the members of the Tribe, which has been hereinabove described. As indicated, this right of refusal necessitated the creation of forms which would demonstrate that the right of refusal had been complied with in order that the bank could proceed with its customary duties as transfer agent.

The contract provided for direct compensation to the bank as transfer agent. It is also apparent from the record that the bank was seeking individual accounts from the tribal members and others. It must be assumed

that the parties contemplated the usual notary fees and other ordinary fees incident to the transfer of shares.

As a saparate matter the bank had also solicited the use of its trust facilities for express trusts to be established by the Secretary for Indians whom he felt were not able to handle their property, all as provided in the termination statute. The position of the bank under these express trusts and the statutory provisions for them must be contrasted with the position of the bank in its capacity as transfer agent. The two created separate and distinct functions and duties on the part of the bank.

The stock transfer contract contained no provision whereby the bank was to discourage stockholders from selling or transferring their shares; instead the procedure which was established was to facilitate such transfers and located at a place convenient to prospective transferees.

As the contract was put into practice, the bank retained the stock certificates of the individuals, and the transfers were handled by stock powers in the usual way. The record shows that the certificates were so retained by the bank in order to prevent their loss by the individual stockholders with the attendant problems to the corporation and the transfer agent in replacing lost certificates. *As will be hereinafter mentioned, the stock certificates bore a warning or admonition to the owners to be careful in selling them as they were of undetermined value.* Since the stockholders did not have possession of the certificates, they did not have an opportunity to read this warning.

Much of the testimony on behalf of the plaintiffs concerned the contents of affidavits which were executed by the plaintiffs in connection with their sale of shares. These affidavits were devised to carry out the right of refusal in that they were to demonstrate that the individual stockholder had in fact sold the shares for the price that he had theretofore offered them to the Tribe or its members by public notice. The affidavit was thus to show that the members of the Tribe did in fact have a real first refusal at the actual selling price. The record shows that in some instances the affidavit may not have accurately described the facts in connection with the sale to the third party. Under the procedure the sale was to be for cash, but the record shows that instead some plaintiffs received automobiles or other tangible property directly or indirectly for their stock instead of cash, or part cash and part tangibles. Bank employees notarized most of these affidavits. The plaintiffs here thus complain that these affidavits which they executed were not accurate, and that the bank and its officials were aware that they were not correct. The record also shows that the Bureau of Indian Affairs office relied upon the recitations in the affidavits when received and issued to the bank a certificate which acknowledged that the right of refusal had been complied with and that the bank could proceed to transfer the shares in the usual way. No shares were transferred by the bank without having first received such a certificate during the period the right of refusal was operative.

The trial court expressly concluded that the bank had a duty to discourage the plaintiffs from the sale

of their shares of stock of the UDC. This finding or conclusion is not supported by the record as no such duty was created by the practice of the bank and none was provided in the contract. Instead the stock transfer provisions and facilities were provided in order to accomplish and facilitate transfers. *The bank was obviously obligated to transfer the shares before August 27, 1964, when requested and when the representative of the Bureau of Indian Affairs indicated that the right of refusal had been honored, and after August 27, 1964, when the stockholder requested that a transfer be made.*

The bank, shortly after the contract was executed, received a letter from the attorney for the Ute Distribution Corporation asking that it attempt to discourage sales, but no response was made to the letter and no duty or obligation was created thereby. As described above, Congress had directed termination of the Government's relationship with the plaintiffs, and this had been accomplished at the pertinent times. The business inexperience of the plaintiff stockholders does not give rise to any duty on the part of the bank to treat them in any manner different than it would treat any other customer inexperienced in business. The record is clear that the plaintiff's corporation, the UDC, and its officers were active in their attempts to discourage stockholders from transferring their shares and had written letters and held meetings on this subject, all apparently with little success.

It would appear that the trial court placed considerable reliance in reaching its conclusion on the asserted inaccuracies in the affidavits executed by the plaintiffs concerning their ultimate sales of the shares.

However, the bank or the Government had no duty as to these plaintiffs to see that they executed affidavits that reflected the true transaction. Furthermore the affadivits were executed in connection with the right of refusal in which, as indicated above, the defendants had no inerest. It is difficult to see how they can complain of inaccuracies in their own affidavits.

The record shows that the bank officials at the Roosevelt office of the defendant bank were active in encouraging a market for the UDC stock among non-Indians. This was probably not contemplated by the UDC-bank relationship. This gave rise to some indirect benefits to the bank by way of increased deposits, but it did not constitute a violation of any duty the bank may have had to the plaintiffs by contract or otherwise.

Liability Under Regulation 10b-5 of the Securities and Exchange Commission:

The only cause of action alleged against the individual defendants Gale and Haslem is based upon the violation of Regulation 10b-5 of the Securities and Exchange Commission (17 C.F.R. § 240.10b-5). This regulation was promulgated under the authority of section 10(b) of the 1934 Securities and Exchange Act. Each plaintiff states a separate cause against each of such defendants.

The record shows that the defendant Gale purchased for resale for his personal profit ten shares of UDC stock from two of the plaintiffs. The several plaintiffs sold 122 shares of their stock in some thirty-

two separate transactions. The trial court found the defendant Gale liable on the sale of all of the 122 shares.

As to his individual purchases, the record shows that Gale bought five shares from the plaintiff, Glen V. Reed, on July 8, 1964, for $350 per share. This purchase was made by Gale for Neal H. Phelps and Esther Phelps, or were resold to such persons who paid Gale $530 per share for these shares. Defendant Gale did not advise plaintiff Reed of the resale.

Gale also purchased three shares of stock from the plaintiff, Letha H. Wopsock, some time after August 21, 1964, for $350 per share for resale at a higher price which is not disclosed in the record. He also purchased another share from the same person in October 1964 for $400 and an additional share in November 1964 for $350. The dispositoin by Gale of these two shares is not indicated in the record.

The record does not show whether or not the defendant Gale participated for his personal profit or derived a personal profit from the purchase by other persons of shares of stock from the plaintiffs.

The participation by the defendant Gale in the sales by other plaintiffs to other persons as shown in the record need not be described in detail. In these transactions a typical participation by the defendant Gale was to act as a notary upon affidavits executed by the purchaser in connection with such a sale which have been hereinabove described or to guarantee the seller's signature on a stock power which was the ultimate basis for the transfer of the shares of stock. As indicated above the trial court found the defendant

Gale liable on each of these transactions. However, we hold this to be in error.

The "participation" by the defendant Gale in the execution of documents as shown by the record in connection with these sales cannot constitute a breach of duty on his part to any of the plaintiffs. In this connection he did no more than to perform ministerial functions required to carry out the transfer of the shares of stock. In this connection the defendant had no obligation to determine whether the recitations made in the affidavit were correct or not. Furthermore, even if he may have known that the recitations in this affidavit were not entirely correct, the plaintiff executing the particular affidavit was prepared and did assert that the facts were correct, and defendant Gale had no obligation to perform anything but the requested ministerial acts.

As to the individual defendant, Verl Haslem, the record indicates a participation in the transactions which is similar to that described above as to the defendant Gale. The trial court also found this defendant liable on each of the thirty-two transactions covering the 122 shares sold by the plaintiffs in this action. The record shows that the defendant Haslem purchased in November 1964 one share of the UDC stock for a third party, or for resale for his personal profit from plaintiff Workman for the sum of $350. This was resold by this defendant for an undisclosed price to his brother.

This defendant also purchased on August 31, 1964, five shares of stock from plaintiff, Glen V. Reed, for $400 per share and resold the stock apparently on the same day at a price not disclosed in the record.

This defendant Haslem "participated" in the other transactions much in the same manner as did the defendant Gale by the execution of affidavits and of signature guarantees and in some instances had nothing whatever to do with the sale. As to these transactions, we find no duty on the part of this defendant to any of the plaintiffs as his acts were purely ministerial in character and were required to accomplish the stock transfers. Likewise his execution of affidavits or guarantees of signature gave rise to no liability to the plaintiffs. Again although the contents of the affidavit may not have been entirely correct, and the defendant may have known of this fact, it did not create any liability to the maker of the incorrect affidavit.

The record clearly shows that the defendant bank, the employer of the defendants Gale and Haslem, had knowledge that its employees were purchasing stock for their own account. Further the record shows that in these transactions, the employees used the bank facilities, premises, and personnel. Under these circumstances, these employees as far as the plaintiffs were concerned were apparently acting within their authority. Thus the bank did become liable for any violation of the Regulation 10b-5.

Regulation 10b-5 reads as follows:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> "(1) to employ any device, scheme, or artifice to defraud,

> "(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Neither the regulation nor the Act contains any statement of standards to be applied or elements necessary in actions for civil liability to be brought under the Act, and in fact there is no express provision for such actions.

The origin of the rule, its relation to section 17 of the 1933 Act (15 U.S.C. § 77q(a)) and the initial doubt as to whether civil actions were contemplated need not be stated here as these matters are elsewhere fully described. Jensen v. Voyles, 393 F.2d 131 (10th Cir.); Doelle v. Ireco Chemicals, 391 F.2d 6 (10th Cir.); Crist v. United Underwriters, Ltd., 343 F.2d 902 (10th Cir.); Stevens v. Vowell, 343 F.2d 374 (10th Cir.). See, Cohen, Truth in Securities Revisited, 79 Harv. L.Rev. 1340; 3 Loss, Securities Regulation, ¶¶ 1785-86 ;Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir.); Kardon v. National Gypsum Co., 69 F.Supp. 512 (E.D.Pa.); Securities & Exchange Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir.) (258 F.Supp. 262); Annot., 37 A.L.R.2d 649; 59 Yale L.J. 1120; 20 Stan.L.Rev. 347; 63 Nw. U.L.Rev. 452; 16 U.C. L.A.L.Rev. 404.

As to the elements to be established, *the record shows that the individual defendants made a misstate-*

ment of a material fact in representing, in those instances wherein they purchased stock for sale at a personal profit, that the prevailing or market price was the figure at which their own purchase was made. This representation was obviously false in those instances in view of the fact that they resold the shares almost immediately at a higher price. The record shows that the plaintiffs considered these defendants to be familiar with the market for the shares of stock and relied upon them when they desired to sell their shares. The individual defendants, in stating to the plaintiffs in instances where individual purchases were made by the defendants with quick resale at a higher price than the price offered was "all that they could give" or "was all that it was worth" or similar statements, made a misrepresentation as to the prevailing price. The defendant Haslem testified with reference to his purchase from plaintiff Workman, "I contacted a number of people telling them that if they were interested in selling, I was interested in offering the highest price." The bank and the individual defendant employees had developed a market at the Roosevelt Agency of the bank for UDC stock, received inquiries from time to time for stock, and had customers of the bank who were prepared to make purchases from time to time. The defendant bank and the individual defendants were thus entirely familiar with the prevailing market for the shares at all material times.

The record shows in some instances that purchases for resale were made, but the resale price is not disclosed in the record. If in these instances there was a resale at a higher price, there was demonstrated thereby

a misrepresentation to the plaintiff concerned as to the prevailing market price. This was a material fact. List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.).

In Stevens v. Vowell, 343 F.2d 374, (10th Cir.); we considered a private action under Regulation 10b-5. The trial court had made findings that critical facts had been concealed from the plaintiff investor and misrepresentations were made to him. The court also specifically found that the plaintiff had there relied upon all the representations made to him by the defendants. These findings were supported by the record. There was no issue on appeal as to reliance, and little as to the fact of misrepresentations. We there stated that it was not necessary to prove common law fraud, but necessary to prove "one of the prohibited actions." This referred to one of the (a), (b) or (c) subsections of the rule. In the cited case the (b) subsection was relied upon and with the reliance established the case was proven. The opinion does not hold that reliance is not required, as the plaintiff urges. It is a basic element of a cause of this nature, and was there shown.

In the case before us the facts of misrepresentation have been shown as to several of the transactions. The record, however, does not contain any evidence relating to reliance by the plaintiffs on the representations of the defendants Gale and Haslem. This is a necessary element of the cause alleged. List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), considers, defines, and requires both materiality of the representations and reliance. See also 16 U.C.L.A. Rev. 404; 63 Nw. U.L. Rev. 434. The plaintiffs allege that certain acts and statements of the defendants were directed to them

or were the proximate cause of their damages. Thus the causal connection must be established—that in fact the loss resulted from defendants' acts—a simple and fundamental proposition in such actions for private damages. The plaintiffs' argument refers to several cases where the proceedings were brought by the SEC for enforcement. The matter of reliance was not there considered, but these are from an entirely different position.

The record does not support the trial court's finding of a conspiracy, plan, or scheme to violate any duties owed to the plaintiffs by any of the defendants. The trial court was in error in so finding.

The record shows sufficient evidence of the use of the mails or instrumentalities of commerce by the individual defendants in their violation of Regulation 10b-5 as described above. The testimony as to the use of checks, even on the defendant bank, together with the correspondence with prospective buyers is sufficient. The defendant Haslem purchased in what are referred to as "face to face" transactions with a plaintiff and the certificate was delivered. However, again a check or checks were used and the trial court's finding is supported on this issue although the facts are not well developed.

The pretrial order is not entirely clear as to the inclusion of transactions taking place after August 27, 1964. However, we agree with the trial court that these properly became trial issues.

The measure of damages has been referred to above briefly. We hold that the trial court was in error in

using the value of $1500 per share in the computation of damages as the evidence does not support such a figure. Also the evidence does not support the finding that the market price was depressed by the defendants. As to the cross-appeals, the evidence as to greater values was entirely speculative, as the trial court concluded.

The measure of damages for breaches of duty under Regulation 10b-5 is the profit made by the defendant on resale of stock purchased from the plaintiffs. If no resale was made or if the resale was not at arm's length, then the measure is the prevailing market price at the time of the purchase from the plaintiffs.

REVERSED and REMANDED for further proceedings in accordance with this opinion.

Appendix No. XIV

List of Pertinent Dates

Sept. 21, 1959	Resolution of Board of Directors of Affiliated Ute Citizens authorizing sale to Elizabeth Bumgarner, Resolution No. 59-320.
Oct. 28, 1959	First Agreement - Probst-Bumgarner
Oct. 28, 1959	Parley Probst to Bureau of Indian Affairs Check - $26,016.00 - Cashed November 9, 1959
	Parley Probst to Elizabeth Bumgarner Check - $1,484.00 - Cashed November 15, 1960.
Oct. 28, 1959	Mortgage - $35,000.00.
Oct. 29, 1959	Mortgage recorded.
Nov. 18, 1959	Minutes of Meeting - Curry present - Elizabeth and Strawberry purchase discussed.
August 11, 1969	Rules and Regulations of the Department of the Interior promulgated.
Sept. 20, 1960	Patent of U.S. Government to Elizabeth Bumgarner.
Nov. 11, 1960	Second Agreement between Probst and Bumgarner.
Nov. 14, 1960	Patent recorded in Wasatch County.
Nov. 27, 1963	Elizabeth Bumgarner died.
Jan. 20, 1964	Date Administratrix appointed.
March 24, 1964	Creditor's Claim filed.
Aug. 27, 1964	Government supervision of Indian land terminated.

Sept. 21, 1964	Administratrix Deed
Oct. 5, 1964	Administratrix Deed recorded.
Sept. 20, 1967	Date complaint filed by Ute Indian Tribe.
Oct. 27, 1967	Date Administratrix filed her cross-complaint.
Sept. 5 & 6, 1968	Trial of the case.
Jan. 7, 1969	Judgment of Trial Court.
Jan. 31, 1969	Notice of Appeal of Probst
April 20, 1970	Opinion filed by United States Court of Appeals, Tenth Circuit.
June 5, 1970	Per Curiam opinion on rehearing filed by United States Court of Appeals, Tenth Circuit.
June 19, 1970	Opinion filed by United States Court of Appeals, Tenth Circuit, in the Reyos case.
July 6, 1970	Affiliated Ute Citizens submit Notice of Acceptance of Offer

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No. 637

In the Supreme Court of the United States

OCTOBER TERM, 1970

PARLEY PROBST,

Petitioner,

vs.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, and ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PARLEY PROBST TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1970

PARLEY PROBST,

Petitioner,

vs.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, and ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bungarner Poowegup, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PARLEY PROBST TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue on behalf of Parley Probst to review the opinion of the United States Court of Appeals for the Tenth Circuit filed in the above-entitled case on the 20th day of April, 1970.

OPINIONS BELOW

The decision of the Federal District Court of Utah, Central Division, was filed on January 7, 1969. Said decision is appended hereto as Appendix I.

The decision of the Tenth Circuit Court of Appeals was filed on April 20, 1970. Said decision is appended hereto as Appendix III.

The decision of the Tenth Circuit Court of Appeals denying timely petitions of Probst and of the Estate for rehearing was filed on June 5, 1970. Said decision is appended hereto as Appendix IV.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by holding that 25 U.S.C. 677n was applicable to the Probst transaction and conferred a statutory right of first refusal on the Ute Indian Tribe.

2. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by holding that the bidding provisions of 25 U.S.C. 677n did not terminate on August 27, 1964.

3. Whether the United States Court of Appeals for the Tenth Circuit has created an intolerable confusion within its own circuit by deciding in the *Reyos* case that the termination date of August 27, 1964 was statutory and absolute and by deciding in the *Probst* case that it was not. See Appendix No. XIII.

4. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by refusing to hold that when the Tribe allowed the termination date of August 27, 1964 to pass without requesting that the Strawberry land be posted and then waiting more than three years before filing this action, it intentionally relinquished and waived any right it may have had to meet the Probst offer on the Strawberry land.

5. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by failing and refusing to apply the Utah Statute of Limitations where the Tribe had alternative remedies at law and in equity for its claim of fraud; and where the Utah Statute of Limitations had run; and whether said Court has thereby brought about a conflict between circuits and also between the Tenth Circuit and the United States Supreme Court which should be resolved by the United States Supreme Court.

6. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by failing and refusing to hold that laches defeated Plaintiff's claim, and whether said Court has thereby brought about a conflict between circuits which should be resolved by the United States Supreme Court.

7. Whether the United States Court of Appeals for the Tenth Circuit Court has committed reversible error by shifting the burden of proof from the shoulders of the Tribe to the shoulders of Probst in determination of whether Probst would be prejudiced by having his land taken away from him after nine years, and

whether said Court has thereby brought about a conflict between circuits which should be resolved by the United States Supreme Court.

8. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by depriving Probst of his property without due process of law, contrary to the Fifth Amendment to the United States Constitution.

9. Whether the United States Court of Appeals for the Tenth Circuit, by holding that after all these years the Tribe can acquire the Strawberry land by simply paying the $35,000.00, has fashioned a remedy that would discriminate against the Affiliated Utes Corporation and against over 1800 individual members of the Tribe, all of whom have rights equal to the Tribe, and whether said fashioned remedy would open the door for a multitude of inappropriate litigation.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Statutes of the United States here involved are 25 U.S.C. Sections 677, 677(a), 677(aa), 677(L)(5) and 677(n), which are appended hereto as Appendix XI, and Regulations set forth in Title 25 of the Code of Federal Regulations, Sections 121.12, 121.61, 243.2, 243.3, 243.4, 243.5, 243.6, 243.7, 243.11 and 243.12, which are appended hereto as Appendix XII. The United States Constitutional provision applicable to Point IX of our Petition is the Fifth Amendment.

STATEMENT OF THE CASE

Note. An Appendix is submitted herewith under separate cover. It contains the decisions and Findings of Fact and Conclusions of Law of the lower Courts, as well as material documentary evidence and material statutes and regulations. Also included is a list of material dates.

PRELIMINARY STATEMENT

On the 27th day of August, 1954, Congress passed into law the Ute Termination Act (25 U.S.C. Sections 677 et seq.). Section 677(n) of said Act provided that any member of the mixed-blood group could dispose of his interest in tribal assets during the next ten years but "shall first offer it to the members of the Tribe." Said section of the Act further provided that Federal supervision over mixed-blood land, including the offering requirement, was to terminate on August 27, 1964.

Elizabeth, a mixed-blood member of the Tribe, was the successful bidder on certain Indian land known as the Strawberry land pursuant to a different section of the Act than the one which contained the offering provision. She acquired the land by an outright purchase pursuant to the provisions of Section 677(L)(5). She paid for the land with money received from Probst pursuant to a written agreement dated October 28, 1959. She died on the 27th day of November 1963. Her daughter, Oranna, was appointed Administratrix of her estate and thereafter discharged the Probst obligation by conveying the land to Probst by a Court-approved Administratrix Deed dated the 21st day of

September 1964. The land had not been posted for bidding.

On the 20th day of September, 1967, the Ute Tribe filed an action in the United States District Court of Utah against Probst and Oranna as Administratrix, alleging that the contractual relationship between Probst and Elizabeth was fraudulent and that the Tribe should be allowed to purchase the land. Thereafter Oranna filed an Answer and also cross-complained against Probst alleging that he had perpetrated a fraud on Elizabeth and Oranna. Probst filed an answer denying the allegations of the Complaint and Cross-complaint and alleging that the Administratrix' Deed was valid.

The case was tried without a jury and on the 7th day of January, 1969, the Court entered an Order divesting Probst of title to the land, holding that the Tribe had no interest in the land, and that title should be delivered to Elizabeth's estate upon repayment of the $35,000.00 to Probst. Probst filed a Notice of Appeal on the 31st day of January, 1969. The Tribe also filed a Notice of Appeal. Thereafter, the case was argued before the United States Court of Appeals for the Tenth Circuit. Said Court filed its opinion on April 20, 1970, reversing the Trial Court and holding that, by virtue of 25 U.S.C. 677(n) and 25 C.F.R. 243.4, the Tribe had acquired a statutory right of first refusal and that upon payment of $35,000.00 to Probst, the Tribe could acquire the Strawberry land.

The Facts

Probst is a life-long resident of Heber, Utah. His business is that of ranching. On the 27th day of October, 1959, at about 9:00 o'clock P.M., someone knocked on the door of his ranch house. He went to the door and "two Indians were standing there" (R. Vol. 1, pg. 89). One of the Indians was Elizabeth and the other was her husband. They asked Probst if he would be interested in purchasing some Indian land (R. Vol. 1, pg. 99). The next morning Probst sought the advice of his attorney, Glen Hatch. Thereafter he and Elizabeth signed an agreement, dated October 28, 1959, at the office of Elizabeth's attorney, Earl Dillman (See Appendix No. V). The agreement was prepared by Dillman and the signatures of the parties were notarized by Dillman (Pltf. Ex. 1). The agreement provided that Probst pay $35,000.00 to Elizabeth, and that Elizabeth use part of the said sum to pay the purchase price of $26,016.00, which she owed on said land as a result of her successful bid. The agreement further provided that as soon as the anticipated regulations were issued by the Secretary of Interior, Elizabeth was to make an offering of the land to the members of the Tribe. In the event nobody bid on the land, she was to convey same to Probst. A mortgage in the amount of $35,000.00 was executed by Elizabeth in favor of Probst as security. Dillman notarized the mortgage (see Appendix No. VII).

After the agreement had been executed, Probst delivered a check in the amount of $26,016.00 to the realty office at the Indian Agency. In addition, he delivered a check in the amount of $7,500.00 to Elizabeth and one in the amount of $1,484.00 to Dillman

to be held in escrow until Elizabeth had made the anticipated offering to the members of the Tribe.

The rules and regulations providing for bidding procedures were issued by the Secretary of Interior on August 11, 1960 (see 25 C.F.R. 243, et seq.). Elizabeth received her patent on September 20, 1960.

Sometime later, Elizabeth and Probst decided to modify the agreement by delaying the anticipated offering on the land. Accordingly, Hatch prepared a second agreement and sent it to Elizabeth at Fort Duchesne, Utah. The agreement is dated November 11, 1960. Elizabeth signed the agreement in Dillman's office. He notarized her signature (see Appendix VI).

Following execution of the second agreement, Dillman delivered the $1,484.00 check to Elizabeth.

Elizabeth's patent was recorded on November 14, 1960 (see Appendix IX). One of the provisions in the patent was as follows:

> "*Prior to August* 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members of the full-blooded and mixed blood groups of the Ute Indian Tribe . . ."

Nothing happened in connection with the land for over three years. The Bumgarners obtained a divorce on December 21, 1961. Sometime later Elizabeth married a man by the man of Poowegup. She was killed in an automobile acident on the 27th day of November 1963. Oranna was appointed as her Administratrix on the 30th day of January 1964.

Hatch filed a Creditor's Claim on behalf of Probst.

on the 24th day of March 1964 (see Appendix VIII). Attached thereto was a copy of the first agreement and a copy of the mortgage. The Creditor's Claim recited that the Adminstratrix had as a first alternative the offering of the land in accordance with the agreement and as a second alternative, in the event said offering was not made prior to August 27, 1964, the conveying of the land to Probst. The claim recited that in the event the Administratrix refused to follow either of the first two alternatives, Probst would demand foreclosure of the mortgage and damages for breach of contract.

Oranna and her attorney did not post the land. Instead they let the termination date of August 27, 1964 pass and then deeded the land to Probst. Oranna delivered the deed to Probst on the 21st day of September 1964. It was recorded on the 5th day of October 1964.

It is significant that the Tribe had full knowledge of the Probst-Bumgarner agreement from the time of the first agreement to the time of the Complaint as demonstrated by the following evidence:

Minutes of the Tribal Business Committee Meeting Held on November 18, 1959.

A Special Meeting of the Ute Tribal Business Committee was held on November 18, 1959. Present at said meeting was Rex Curry, Executive-Secretary of the Tribe and brother of Elizabeth. The following notation appears in the minutes:

> "Thomas Appah came into the meeting and talked some of the Avintiquin sale also Liz purchased parts in in the Strawberry Valley and in turn reselling to individuals. Tommy was interested in this particular tract of land and was quite perturbed about it." (Def. Ex. F)

Based on said minute entry, the Trial Court made the following Finding of Fact:

> "27. As early as November 18, 1959, plaintiff, the Ute Indian Tribe of the Uintah and Ouray Reservation, had knowledge of the October 28, 1959 executory sale of and between Elizabeth C. Bumgarner as Seller and Parley Probst as Buyer, said knowledge being evidenced by the minutes of the meeting of said tribe on November 18, 1959. . . ."

The Tribe, nevertheless, waited seven years and ten months before taking any action to enforce its so-called right of first refusal on Elizabeth's land.

The Boyden-Hatch Telephone Conversation

Boyden was a member of the Ute Tribal Business Committee and legal counsel for the Tribe. He was closely associated with Curry. They talked with each other "practically every day." (R. Vol. III, p. 225).

Hatch made a telephone call to Boyden on July 15, 1960. He informed Boyden that Probst had an interest in the Bumgarner land and asked for advice as to when the regulations with regard to posting and bidding would be issued by the Department of Interior. Boyden responded with the query, "That's that

isolated tract, isn't it?" (R.Vol. I, p. 96). Said conversation is additional proof that for at least seven years and two months before this action was filed, the Tribe had known that Probst was purchasing the Strawberry land from Elizabeth, that Glen Hatch was attorney for Probst, that posting and bidding prior to August 27, 1964 would be necessary in order to complete the sale, and that there had been no posting and bidding on the land. See footnote No. 1.

The Curry-Probst-Hatch Meeting of the Latter Part of 1963 or the First Part of 1964

Curry was Resource Director for the Ute Tribe. It was his responsibility to represent the Tribe's interest in connection with sales of Indian land (R.Vol. I; pg. 32).

In the latter part of 1963 or the first part of 1964, Probst and Hatch made a trip to see Curry at his office at Fort Duchesne. Curry testified:

> "A. 1963. Mr. Probst and Mr. Hatch came to our office — came to my office *and indicated they had advanced some funds to her for the purchase of the lands*. I think it was — the latter part of 1963 or possible the first part of 1964. In any event, it was after Elizabeth had died." (Elizabeth died November 27, 1963.)

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[1] Could it be that when Boyden made the "isolated tract" comment he was indicating a realization that said land had been acquired by Elizabeth pursuant to Sec. 677(L)(5), was not a "distributive share," and that consequently the Tribe had no interest in the land? Could this account for the long standing tribal indifference to the Strawberry land? See Point I of this Petition.

and again:

> Q. What was that conversation?
>
> *A. They advised me that they had an interest in the land, and I told them that she couldn't sell the land unless it had been offered to the Tribe first, until after August of* 1964. . . .

Once again the Tribe had been forcefully reminded that Probst was purchasing the Strawberry land and that no posting or bidding had taken place. As Resource Director, Curry supervised the sales of Indian lands. He knew all about bidding regulations on Indian land and was well aware of the significance of the date of August 27, 1964. *Yet he allowed said date to come and go without taking any measures whatsoever to protect the right of the Tribe to bid on Elizabeth's land; and even after the bidding right had expired, he waited for over three years before he and Boyden finally filed the complaint in this case.*

The Recorded Mortgage

The mortgage securing the Bumgarner-Probst agreement was recorded on October 29, 1959. It reads in part as follows:

> "This mortgage is given to secure the following obligations: A contract between the parties of even date herewith, and performance of the terms thereof which require, among other things, re-payment of Thirty Five Thousand Dollars, in the event of a failure of mortgagor to perform the provisions thereof." (Def. Ex. A)

The Tribe is charged with knowledge of the content of the mortgage. See *United States v. Christopher*, 71 F.2d 764 (10th Cir. 1934).

The Bureau of Indian Affairs Records

Following execution of the first agreement, Probst and his attorney delivered to the Realty Office of the Bureau of Indian Affairs a check made out by Probst, payable to the order of the Bureau of Indian Affairs, and dated October 28, 1959. On its face the check stated, "for special account on land purchase" (see Ex. J). The records in the Realty Office were public records (R. Vol. I, pgs. 23, 24). Curry knew that he could obtain the facts concerning any real estate transaction involving a Tribal member by simply consulting the Realty Office (R.Vol. I, pgs. 36, 37). The Probst transaction had been on record at the Realty Office for seven years and 11 months prior to the filing of the Complaint.

Taxes on the Strawberry Land

The records of the Wasatch County Treasurer show that Probst paid the taxes on the Strawberry land in 1961, 1962, 1963, 1964, 1965 and 1966 (See Def. Ex. G).

In addition, Probst has been in possession of the land since October 28, 1959. He made improvements on the land in 1961 (R.Vol. I, pg. 103).

There is no question about the fact that Curry deliberately chose to allow the termination date of August 27, 1964 to come and go without taking any steps to require an offering to the members of the Tribe.

Note. We assure this Honorable Court that no evidence was presented at the trial of this case which either established or tended to establish any

fraud or misrepresentation of any kind on the part of Probst or Elizabeth. Without exception the parties to all transactions were represented by their respective counsel in fair arms-length transactions. The issues raised between Probst and Oranna as Administratrix on appeal to the Circuit Court were never resolved by that Court in view of its holding that the Ute Indian Tribe had acquired a statutory right of first refusal on the Strawberry land. If that issue was improperly resolved, as we are confident that it was, then we respectfully suggest that the case should be returned to the Circuit Court for resolution of the issues between Probst and Oranna, the outcome of which should determine who will receive the Strawberry land.

ARGUMENT

Note. The points we raise herein are set forth in logical sequence and are not necessarily in order of importance. We believe each and every point has substantial merit and constitutes ground for granting our Petition, either standing alone or in combination.

POINT I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY HOLDING THAT 25 U.S.C. 677n WAS APPLICABLE TO THE PROBST TRANSACTION AND CONFERRED A STATUTORY RIGHT OF FIRST REFUSAL ON THE UTE TRIBE.

POINT II. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY HOLDING THAT THE BIDDING PROVI-

SIONS OF 25 U.S.C. 677n DID NOT TERMINATE ON AUGUST 27, 1964.

POINT III. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS CREATED AN INTOLERABLE CONFUSION WITHIN ITS OWN CIRCUIT BY DECIDING IN THE *REYOS CASE* THAT THE TERMINATION DATE OF AUGUST 27, 1964 WAS STATUTORY AND ABSOLUTE AND BY DECIDING IN THE *PROBST CASE* THAT IT WAS NOT.

POINT IV. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY REFUSING TO HOLD THAT WHEN THE TRIBE ALLOWED THE TERMINATION DATE OF AUGUST 27, 1964 TO PASS WITHOUT REQUESTING THAT THE STRAWBERRY LAND BE POSTED AND THEN WAITED MORE THAN THREE YEARS BEFORE FILING THIS ACTION, *IT INTENTIONALLY RELINQUISHED AND WAIVED* ANY RIGHT IT MAY HAVE HAD TO MEET THE PROBST OFFER ON THE STRAWBERRY LAND.

POINT V. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY REFUSING TO APPLY THE UTAH STATUTE OF LIMITATIONS WHERE THE TRIBE HAD ALTERNATIVE REMEDIES AT LAW AND IN EQUITY FOR ITS CLAIM OF

FRAUD AND WHERE THE UTAH STATUTE OF LIMITATIONS HAD RUN.

POINT VI. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY FAILING AND REFUSING TO HOLD THAT LACHES DEFEATED THE UTE TRIBE'S CLAIM.

POINT VII. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY SHIFTING THE BURDEN OF PROOF FROM THE SHOULDERS OF THE TRIBE TO THE SHOULDERS OF PROBST IN MAKING THE DETERMINATION OF WHETHER PROBST WOULD BE PREJUDICED BY HAVING HIS LAND TAKEN AWAY FROM HIM AFTER EIGHT YEARS.

POINT VIII. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY DEPRIVING PROBST OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

POINT IX. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS FASHIONED AN INEQUITABLE AND DISCRIMINATORY REMEDY THAT WOULD OPEN THE DOOR FOR A MULTITUDE OF INAPPROPRIATE LITIGATION

BY HOLDING THAT THE UTE TRIBE IS ENTITLED TO RECEIVE THE STRAWBERRY LAND UPON PAYMENT OF $35,000.00.

POINT I.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY HOLDING THAT 25 U.S.C. 677n WAS APPLICABLE TO THE PROBST TRANSACTION AND CONFERRED A STATUTORY RIGHT OF FIRST REFUSAL ON THE UTE TRIBE.

The Circuit Court made the following statement in its opinion:

> "The construction and application of Sec. 677n is decisive. The land was a tribal asset."

Said statement is erroneous in two particulars. First, the land was not a tribal asset at the time of the Probst transaction, and, second, Sec. 677n is not decisive. It is not even applicable. We respectfully request this Honorable Court to consider the background and circumstances of the Strawberry purchase in the light of the position we take on this important point.

Background

The Plan of Distribution approved and adopted by the full-blood and mixed-blood members of the Ute Tribe pursuant to the Termination Act provided for division of the tribal land, with the mixed-bloods receiving twenty-seven percent and the full-bloods sev-

enty-three percent. During the ten year period between August 27, 1954 and August 27, 1964, the plan was for the mixed-bloods to progress steadily to the point of full citizenship and unrestricted ownership of their respective shares of the tribal assets. The Affiliated Utes, a body corporate, was the designated representative authorized to handle mixed-blood real property during the aforementioned transitional period. The more desirable real property belonging to the mixed-bloods was to be parcelled out by the Affiliated Utes to the members as their "distributive shares." No consideration was to be paid by the members on their "distributive shares" and said real property was, therefore, considered to continue as part of the tribal assets. Such "distributive shares," being part of the tribal assets, could only be disposed of during the ten-year period by compliance with Sec. 677n of the Act.

On the other hand, some of the more undesirable marginal real property was to be made the subject of outright sales by the Affiliated Utes to both members and non-members of the Tribe pursuant to Sec. 677(L)(5) of the Act. *Under said section, the purchaser, whether he was a member or a non-member, was under no statutory obligation whatsoever to make any offering to the members of the Tribe prior to a resale of the property.* Said section authorized delivery of an unencumbered title to the purchaser. The stated Congressional purpose in authorizing such outright sales was to allow the mixed-bloods to dispose of land "when, in the opinion of the majority of said mixed-blood group, a practical partition cannot be made." It was thought that the best interest of the membership would be better served by sell-

ing such real property "and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group." Thus, the very purpose of Sec. 677 (L) (5) was to allow greater flexibility in disposal of land which the majority of the mixed-blood membership did not desire to have distributed to them as part of their respective "distributive shares" *and the exclusion of the bidding requirement from said section appears clearly to have been a deliberate exclusion to effectuate said purpose.*

The Strawberry land, being an "isolated tract" far removed from other tribal land, was particularly well suited for outright sale rather than partitioning as part of the tribal assets.

THE STRAWBERRY PURCHASE

In September of 1959, the Affiliated Utes decided to sell the Strawberry land as a result of a determination made by a majority of the membership that said land was undesirable for partitioning. Elizabeth became the purchaser at a cash sale made pursuant to Sec. 677 (L) (5). *By virtue of said sale the Strawberry land ceased to be a part of the tribal assets. The purchase price of $26,016.00 had, instead, become the tribal asset.* Therefore, when Elizabeth entered the Probst agreement, she was offering for sale a piece of real property that belonged solely to her and in which the members of the Tribe no longer had an interest. *Yet only if the land were a tribal asset at the time of the Probst transaction would Sec. 677n be applicable.* The language of Sec. 677n is explicit on this matter where it sets forth the subject of the section as follows:

"Any member of the mixed-blood group may dispose of his interest *in the tribal assets*. . . .

and then goes on to discuss the *manner* in which such disposal of assets may take place.

In view of the fact that the Strawberry land was not a tribal asset at the time of the Probst transaction, it follows that Sec. 677n was not applicable, and, of course, it also follows that no statutory right of first refusal belonging to the Tribe ever came into existence. Inasmuch as the Tribe had no statutory right of first refusal, we are back to the conclusion that the Trial Court was correct when it decided that the Tribe had "no interest" in the Strawberry land.

It is true that the Secretary placed a ten-year bidding restriction in Elizabeth's patent which was issued many months after the Probst agreement. His purpose in doing so was never revealed at the trial. But this much is clear. There is no way the Tribe could acquire an enforcible right of first refusal by virtue of said restrictive covenant, for the reason that the covenant was not authorized by the governing statute under which Elizabeth had made her purchase. The right to sell marginal land *without* submitting it to a bid, granted under Sec. 677(L)(5) to the Affiliated Utes upon a vote of the majority of its membership, would be a legal nullity if the Secretary could negate that right by simply placing a restrictive covenant in the patent. The recent case of *Tooahnippah v. Hickel*, reversing the Tenth Circuit Court of Appeals, at 397 U.S. 598, 25 L.Ed.2d 600, 90 S.Ct. 1316 (1970), supports our position where Mr. Chief Justice Burger states:

> "We need not here undertake to spell out the scope of the Secretary's power, but we cannot assume that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away with the other by vesting in the Secretary the same degree of authority to disapprove such a disposition."

The language of this Court in *Francis v. Francis*, 203 U.S. 233, 27 S.Ct. 129, 51 L.Ed. 165 (1906), would also appear to be applicable:

> "It follows that the words in the patent of 1827 'but never to be conveyed by them or their heirs without the consent and permission of the President of the United States,' were ineffectual as a restriction upon the power of alienation. The President had no authority, in virtue of his office, to impose any such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed."

Whether the patent was too broad or too restrictive was strictly a matter between Elizabeth and the Secretary.

In summary, the Tribe acquired no statutory right of first refusal by virtue of Sec. 677n because that section was inapplicable in view of Elizabeth's outright purchase under Sec. 677(L)(5). It acquired no right of first refusal by virtue of the patent because the restrictive covenant in the patent was not authorized by the statute under which the original purchase had been made. It acquired no right of first refusal by virtue of the Probst agreement because that was a private matter between Elizabeth and Probst. And if the Tribe acquired no right of first refusal then, of

course, the Circuit court's decision is based on an untenable premise, and must fall.

The Circuit Court's erroneous decision doesn't just affect the parties to this lawsuit. It affects, in varying degrees, the membership of an entire tribe of Indians. It also affects the titles to numerous tracts of mixed-blood land. We need only point out that if the Circuit Court's decision is allowed to stand, all of the marginal land, sold by the Affiliated Utes pursuant to Sec. 677(L) (5) during the ten-year transitional period, will become subject to the bidding restrictions of Sec. 677n. *What is then to prevent the Tribe from even now acquiring every single parcel of land purchased under the aforesaid circumstances pursuant to Sec. 677 (L) (5) by simply offering to meet the original sale price?* Congress can't possibly have intended to give the Ute Tribe such awesome control over ultimate disposition of mixed-blood land.

The Termination Act, and more particularly, the sections of the Act which are here involved, have never been interpreted by the United States Supreme Court. We submit that there are substantial and compelling reasons why this Honorable Court should grant our Petition.

POINT II.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY HOLDING THAT THE BIDDING PROVI-

SIONS OF 25 U.S.C. 677n DID NOT TERMINATE ON AUGUST 27, 1964.

As indicated in Point I of our Petition, the Tenth Circuit Court of Appeals has committed reversible error by holding that Sec. 677n of the Ute Termination Act was applicable to the Probst transaction. We take the position that, even assuming said section of the Act to be applicable, the Circuit Court has compounded its error by holding that strings still attached to the Strawberry land in spite of the fact that Oranna did not dispose of said land until after the statutory termination date of August 27, 1964. Said holding is contrary to the stated Congressional purpose of the Act and is contrary to the language of the Act.

In support of its opinion, the Circuit Court makes the following statement:

> "We believe that when a mixed-blood *determines* within the ten-year period to dispose of his acquired interest, the Tribe had the right to have the property offered to it in accordance with the statute and regulations. Elizabeth determined to sell the land at or before the time when she entered into the first contract with Probst. She did not offer the land to the Tribe. Her administratrix in turn did not offer it, but instead waited until the expiration of the ten-year period and then gave Probst a deed. The Tribe was thus deprived of its statutory right."

Thus, the Circuit Court has held that if a mixed-blood landowner "determines to dispose" of his land within the ten-year period, the other members of the Tribe instantly acquire a right of first refusal and no person can thereafter acquire title to such land without

being subject to the possibility that at some future date a member of the Tribe might decide to meet the original sale price.

Furthermore, under the Circuit Court's opinion, once a "determination to dispose" has been made within the ten-year period, the owner has burned his bridges and has no right to change his mind. He has "determined to dispose" of his land, and the right of the members of the Tribe to demand that he make an offering, as well as their right of first refusal on the offering, is absolute. It becomes a covenant running with the land in perpetuity. The termination date of August 27, 1964 has thus been rendered meaningless and the member-owner has lost the right which Congress gave him to dispose of his land after that date *without* being subject to Federal supervision.

We take the position that August 27, 1964 was meant by Congress to be a significant date in the lives of the mixed-bloods—that it was the date on which they were freed of the bondage that had theretofore prevented them from disposing of their land without governmental supervision. The Congressional purpose of the Termination Act conforms with our position, as is evident from a reading of the Act itself where it is stated:

> "The purpose of sections 677-677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; *for the termination of Federal supervision over the trust, and restricted property of the mixed-blood members of said tribe;* . . ."

A further explanation of the purpose of the Act can be found in House Report No. 2493 where it is stated:

> "*The enactment of the bill will permit the early termination of Federal supervision over approximately one-fourth of the members of the Ute Tribe, who have advanced culturally, socially, and economically to the point where they do not need special Federal supervision and service . . .*"

In said report also appears a letter from Orme Lewis, Assistant Secretary of Interior, wherein the purpose of the Act is stated to be as follows:

> "5. The termination of restrictions on individually owned property of the mixed-blood group."

The language of 25 U.S.C. 677n conforms to the stated purpose of the Act. Said section reads as follows:

> "Any . . . mixed-blood may dispose of his interest . . . prior to termination of federal supervision, subject to the approval of the Secretary. In the event a . . . mixed-blood . . . *determines to dispose of his interest . . . within 10 years from August 27, 1954 . . . he shall first offer* it to the members of the Tribe, and no sale of any interest . . . shall be authorized without such offer . . . in such form as may be approved by the Secretary."

To paraphrase Section 677n, Congress has said that, in the event a mixed-blood "determines to *dispose*" of his interest within the ten-year period, "he shall first offer" to the members of the Tribe. The word "first" simply means that the landowner must offer the land to the members of the Tribe before he disposes of the land, *in the event he disposes of same within the ten-year period.*

We call attention to the regulations adopted by the Secretary sometime later. 25 C.F.R. 243.4 supports our analysis completely. It states:

> "Subsequent to the termination of Federal supervision over the property of a mixed-blood member . . . and *before August* 27, 1964, *any* mixed-blood member *may dispose of his interest* in any real property, as herein defined *after having provided members of the tribe with an an opportunity to meet . . . the highest bona fide offer* received by him."

The section then goes on to set forth language to be placed in "any deed or other instrument of conveyance" as follows:

> "*Prior to August* 27, 1964 *the grantee hereunder shall not dispose of any interest* in the property herein conveyed without first offering it to the members . . ."

Thus, August 27, 1964 is set forth very clearly as the crucial date and the subject of the section is *actual disposal rather than determination to dispose.*

Incidentally, the language that showed up in Elizabeth's patent is the language of 25 C.F.R. 243.4. The patent states:

> "Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members . . ." See Appendix IX.

When the statute and regulations are read together, a number of conclusions can be drawn:

1. A member owner has the right to "determine to dispose" of his land and to seek and obtain offers from non-members during the ten year period.

2. Non-members who make such offers are not outlaws simply because they are dealing with mixed-bloods who are on the verge of full citizenship. Nor is there any public policy against such offers.

3. After an offer has been made, the member owner has two basic choices in disposing of his interest in the land:

(a) Before August 27, 1964, if he undertakes to "dispose of his interest" in the land, he must first offer the land to members of the Tribe.

(b) After August 27, 1964, if he undertakes to "dispose of his interest" in the land, he can do so without offering the land to members of the Tribe.

4. *If the mixed-blood owner decides not to dispose of his interest in the land, at any time before actual disposal of said interest, there is absolutely no statutory or regulatory requirement that said owner must offer the land for sale to the members of the Tribe.*

5. After August 27, 1964, all Federal restrictions upon the sale of mixed-blood land of every kind and nature whatsoever are terminated.

One reason why the Tenth Circuit took a position inconsistent with our claim that August 27, 1964 was the date on which Federal supervision over mixed-blood land terminated, was its stated belief that ". . . Congress, by incorporating Sec. 677n into the Act, had in mind primarily the protection of the tribe and only secondarily, if at all, the protection of the selling mixed-blood." We cannot allow this statement to pass uncontested.

First, the distribution of 27% of the tribal lands to the mixed-bloods and of the other 73% to the full-bloods shows that what Congress basically had in mind was the ultimate individual member ownership of all of said lands. In this connection, the Affiliated Utes, representing the mixed-bloods, was authorized to distribute a part of the land to the individual members as part of their "distributive shares" of mixed-blood land, subject only to the bidding restriction contained in Sec. 677n. Such an owner, once having received his distributive share, could mortgage it, lease it, or exercise any other indicia of ownership. In connection with such mortgages, he was specifically authorized to mortgage to non-members, subject only to approval of the Secretary, and such mortgage holders then had the right to foreclose and thus acquire absolute ownership with no intervening right whatsoever on the part of members of the Tribe. See 25 C.F.R. 121.61. In addition, the Affiliated Utes were authorized to make outright sales of their more undesirable marginal land to members *or* non-members under Sec. 677(L)(5) *without* any bidding restrictions whatsoever. The whole concept of land disposal under Sections 677n and 677(L)(5) is inconsistent with the Circuit Court's statement concerning Congressional intent.

Second, if the primary purpose of Congress was to protect the members of the Tribe against alienation of Indian land, all Congress need have done was to incorporate a provision in the Act that no member of the Tribe could *ever* sell his land, however acquired, to a non-member without subjecting it to a bidding proce-

dure authorizing any member to meet the offered price. This was *not* done.

Third, the fact that August 27, 1964 was fixed by Congress as the date on which all Government restrictions on alienation of mixed-blood land terminated, is entirely inconsistent with the Circuit Court's Congressional intent theory. It should be quite obvious that the primary purpose of the bidding restriction of Sec. 677n was to give the mixed-blood owner a better chance of obtaining a fair price for his land during the ten-year transitional period, after which he was expected to have arrived at a degree of responsibility which would enable him to handle his own affairs without further governmental assistance. The bidding privilege accorded to the members of the Tribe was only of secondary importance.

Returning to the case at bar and assuming once again, but not admitting, that Sec. 677n is applicable to the Probst agreement, it becomes apparent that when Elizabeth entered her agreement with Probst she, in fact, had "determined to dispose" of her land. But that determination was contingent on a number of factors and couldn't possibly be carried out in the near future. For instance, she had to obtain her patent. In addition, the rules and regulations of the Secretary pertaining to offerings on mixed-blood land had to be issued. In the meantime Elizabeth changed her mind and decided to delay disposing of her land. Is there anything sinister about such a decision on Elizabeth's part? Of course not! This was her land. She had paid the full purchase price for it. *She had no duty whatsoever to dispose of it prior to August 27, 1964 or at all. If she chose to alter or even abolish her agreement with Probst that was nobody-*

else's business. It most certainly was not the business of the Tribe. Under the terms of Sec. 677n she was entitled to exercise every indicia of ownership just so long as she didn't dispose of her land before August 27, 1964. After that date she and her heirs were freed of the last vestige of governmental control over her land. They could then recognize or repudiate the Probst claim and would be answerable only to him in a Court of competent jurisdiction under ordinary principles of Contract law.

What actually happened was that after August 27, 1964, Oranna and her attorney decided to satisfy the Probst obligation by conveying the land to Probst in accordance with paragraph 2 of the Creditor's Claim. *The land had never been disposed of by Elizabeth or Oranna prior to that time.* The deed was executed for a valid consideration and pursuant to an order of the Court having jurisdiction over Elizabeth's estate. Its execution was the culmination of a series of transactions that violated none of the proscriptions contained in Sec. 677n or in any other section of the Termination Act. Thus, the Tribe acquired no interest in the Strawberry land.

As heretofore pointed out, the Termination Act has never been interpreted by the United States Supreme Court: We believe there are special and compelling reasons for granting our Petition and reviewing the important point raised herein.

POINT III.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS CREATED AN INTOLERABLE CONFUSION WITHIN ITS OWN CIRCUIT BY DECIDING IN THE *REYOS CASE* THAT THE TERMINATION DATE OF AUGUST 27, 1964 WAS STATUTORY AND ABSOLUTE AND BY DECIDING IN THE *PROBST CASE* THAT IT WAS NOT. See Appendix XIII.

By coincidence, two different divisions of the Tenth Circuit Court of Appeals simultaneously considered different aspects of the Ute Termination Act and arrived at divergent opinions concerning whether 25 U.S.C. 677n in fact terminated Federal supervision over mixed-blood property on August 27, 1964. In the case of *Reyos, et al. v. United States of America, et al.*, Case Nos. 40-69, 41-69, 42-69, 43-69 and 44-69, twelve mixed-blood members of the Ute Indian Tribe filed a suit as a test case on behalf of eighty-five members of the Tribe against the United States of America and against the First Security Bank of Utah, among others. The claim against the United States, insofar as material here, was that the Federal trust relationship of the Government with mixed-blood members did not actually terminate by virtue of the various provisions of the Termination Act but that a sort of wardship over the affairs of the mixed-bloods continued beyond the various termination dates fixed in the Act. The Trial Court went along with this theory but the Circuit, in a decision dated June 19, 1970, reversed and held that the termination dates, including the date of August 27, 1964, were absolute and

binding because they were so declared by Congress. The decision is long and involves many facets of the relationship of the mixed-bloods with the Government as well as with non-members of the Tribe. We quote a few statements of the Court that we believe are material here:

> "Thus in the event that a stockholder of the Ute Distribution Corporation desired to sell his stock before August 27, 1964, it was necessary that it first be offered for sale at a stated price to the tribe or to the members of the tribe . . .
>
> "This provision can best be referred to as a right of refusal in the members of the tribe or the tribe. *It expired on August* 27, 1964."

By way of explanation, the Ute Distribution Corporation stock mentioned in the ***Reyos case*** was a part of the mixed-blood tribal assets to which each member was entitled to a distributive share and which consequently would fall into the same category as the distributive shares of real property allocated to mixed-blood members. Said stock was subject to exactly the same restrictions on disposal which governed other tribal assets under the provisions of Sec. 677n. The Court went on to say:

> "The statute expressly provides for termination of the Government's relationship with the individual mixed-bloods. The provisions are clear and the termination was accomplished and is final. It is clearly within the power of Congress and no one else to provide for such an end to the relationship between these individuals and the Government. (Citing cases). *It is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination* . . ."

The Court concluded its remarks with the following holding:

> "The trial court was thus in error in concluding that limited aspects of the federal trust relationship continued, *or that any form of wardship continued*, and thus that some duty on the part of the Government to the plaintiffs continued after termination in connection with their sales of U.D.C. stock. There being no duty the trial court was in error in awarding damages against the United States under the Tort Claims Act.

The basic variance between the decision in the *Reyos case* and the decision in the case at bar is clear. In the *Probst case* the Tenth Circuit Court has stated that under the provisions of Sec. 677n, as soon as a mixed-blood member "determines to dispose" of his land, a right of first refusal comes into existence and that, regardless of when the owner actually *undertakes* to dispose of the land, the said right of first refusal remains attached to the land. The fact that disposal takes place after August 27, 1964 is immaterial. We submit that this is simply another attempted establishment of a "status lying between wardship and complete termination" condemned in the *Reyos case*. In the *Reyos case* the Tenth Circuit Court has said that no "limited aspects of the federal trust relationship continued," that "It is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination." and also that the right of first refusal in the members of the Tribe "*expired on August 27, 1964.*"

Either the right of first refusal expired on August 27, 1964, or it didn't. The Tenth Circuit has said that it

did in *Regos* and that it didn't in *Probst*. We respectfully submit that this Honorable Court should grant our Petition in order to clarify the conflict within the Tenth Circuit as to the significance of August 27, 1964 as the statutory date on which the right of first refusal ended for the members of the Tribe.

POINT IV.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY REFUSING TO HOLD THAT WHEN THE TRIBE ALLOWED THE TERMINATION DATE OF AUGUST 27, 1964 TO PASS WITHOUT REQUESTING THAT THE STRAWBERRY LAND BE POSTED AND THEN WAITED MORE THAN THREE YEARS BEFORE FILING THIS ACTION, *IT INTENTIONALLY RELINQUISHED AND WAIVED* ANY RIGHT IT MAY HAVE HAD TO MEET THE PROBST OFFER ON THE STRAWBERRY LAND.

The Circuit Court has held that, pursuant to 25 U.S.C. 677n, the Tribe acquired a statutory right of first refusal at the time Elizabeth "determined to sell her land." Again assuming, but not admitting, that the Tribe did acquire a right of first refusal, most certainly that right is limited and circumscribed by the statute that created it. Said statute terminated the offering requirement as of August 27, 1964.

Since a legal right doesn't carry with it a legal duty

on the part of its possessor to exercise that right, the question here is whether the Tribe was deprived of its so-called right of first refusal on Elizabeth's land or whether it simply relinquished and waived that right. This question can best be answered by considering the knowledge possessed by the Tribe *as Curry and the other members of the Tribal Council stood by and watched August 27, 1964 come and go with no indication whatsoever that they were in the least bit interested in the Strawberry land.*

We have heretofore pointed out the mountainous evidence showing tribal awareness of the 1959 agreement between Probst and Elizabeth. We have called attention to the meeting of the Tribal Council on November 18, 1959, at which Thomas Appah discussed the matter with the Council; the Boyden-Hatch telephone conversation of July 15, 1960; the mortgage which was recorded on October 29, 1959; the Bureau of Indian Affairs records revealing details of the agreement; the taxes paid by Probst on the land over a period of many years; and last, but by no means least, the conversation of Hatch and Probst with Curry at Curry's office in which Curry admitted he had been advised that Probst had advanced money on the purchase of Elizabeth's land.

Let us consider the significance of Curry's testimony concerning this conversation in the light of the Circuit Court's holding that a tribal right of first refusal comes into existence immediately when an owner "determines to sell" his land. Did the fact, as Curry testified, that Probst "had advanced some funds to her for the purchase of the land" indicate to Curry that Eliza-

beth had "determined to sell" her land? It obviously indicated just that to Curry because he then said, "I told them that she couldn't sell the land unless it had been offered to the Tribe first, until after August of 1964." One thing is perfectly clear from this conversation. *Curry believed that a sale could not be made before August 27, 1964 without a posting but that such a sale could be made after August 27, 1964 without a posting.* Thus believing, he deliberately let that important date come and go without demonstrating the slightest interest in the Strawberry land. The only logical conclusion to be drawn from Curry's inaction is that the Tribe simply was not interested in meeting the $35,000.00 purchase price on said land. *Yet only if the Tribe had proven that on or before August 27, 1964 they were able to, and desirous of, paying $35,000.00 for the Strawberry land should they have prevailed in this case.* The Tenth Circuit Court recognizes that such is the case where it makes the following statement:

> "The language of § 677n means that Congress believed it preferable that tribal land acquired by a mixed-blood, who determine to sell before 1964, return to the Tribe *if the Tribe wanted it and could match the offering price.*"

The Circuit Court then proceeds to totally ignore the fact that the Tribe failed in its burden of proof on this subject. Where is there any evidence to sustain a finding that before August 27, 1964 "the Tribe wanted this land? Where is there any evidence that the Tribe could "match the offering price?" The Trial Court recognized this deficiency in the Tribe's evidence in its Conclusion of Law No. 11 (R.Vol.IV, Pg. 22), where the Trial Court states:

> "In the case at bar the plaintiff Tribe suggests injury by being deprived of the opportunity of acquiring the property for $35,000. It is speculative because of the impossibility of reconstructing what would have happened should the property have been posted that the Tribe would have acquired the property at all and certainly it is speculative that it would have acquired it for $35,000."

The fact of the matter is that, as Resource Director of the Tribe, Curry was simply not interested in paying $35,000.00 for the Strawberry land. This isn't hard to understand. All anyone needs to do is look at the map in evidence in this case which shows literally thousands upon thousands of acres of undeveloped range land that had been set apart for the Ute Tribe in the distribution plan. This particular "isolated tract" of marginal land wasn't thought to have any unique or exceptional value, as evidenced by the fact that Elizabeth was the successful bidder and that her bid was less than the appraised value of the land. The Tribe would have had to pay $9,000.00 *more* than the last Government appraisal on this land in order to have purchased it before August 27, 1964. This it had no intention of doing.

In this connection, we cite *Alexander v. Phillips Petroleum Co.*, 130 F.2d 593 (10th Cir. 1942), where the Court stated:

> "Where a plaintiff, with knowledge of the relevant facts, acquiesces for an unreasonable length of time in the assertion of a right adverse to his own, the Court may presume assent to the adverse right, and the consequent waiver of the right sought to be enforced. (Citing cases)

When the Tribe watched August 27, 1964 come and go with full knowledge of the Probst transaction, can it be doubted that the Tribe was acquiescing "for an unreasonable length of time in the assertion of a right adverse to his (its) own, . . . " and consequently assented to the adverse right and waived its right to enforce same?

In August of 1964, the Tribe didn't want the Strawberry land. In September of 1967 things had changed. The Tribe had decided that the value of the land was such that it would be profitable for them to attempt a renewal of their so-called right of first refusal even if it was necessary to accuse innocent people of fraud in order to do it. Their motive was profit. The question is, should the Tribe be allowed to wait over three years after the offering requirement had lapsed to see whether land values would go up or down? We all know that if the value of this land had gone down, the suit would never have been filed.

Consider the language of *Alexander v. Phillips Petroleum Co., supra,* where the Tenth Circuit Court emphasized that:

> "A person may not withhold his claim awaiting the outcome of a doubtful enterprise and, after the enterprise has resulted in financial success favorable to the claimant, assert his interest, especially where he has thus avoided the risks of the enterprise. The injustice of permitting one, holding the right to assert an interest in property of a speculative character, to voluntarily await the event and then decide when the danger is over and the risk has been that of another, to come in and share the profit is obvious. In such circumstances, persons having claims to

property are bound to use the utmost diligence in enforcing them . . . "

The Tribe waited for over three years following expiration of the termination date with full knowledge of the Probst transaction. Most certainly its conduct in this regard cannot be characterized as "utmost diligence" or for that matter as any diligence at all. Under all acceptable principles of equity law, the Tribe must be held to have intentionally relinquished and waived any right it may have had of first refusal on the Strawberry land.

POINT V.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY REFUSING TO APPLY THE UTAH STATUTE OF LIMITATIONS WHERE THE TRIBE HAD ALTERNATIVE REMEDIES AT LAW AND IN EQUITY FOR ITS CLAIM OF FRAUD AND WHERE THE UTAH STATUTE OF LIMITATIONS HAD RUN.

The Federal rule is that, where a Federal Court has jurisdiction to grant either equitable or legal relief, equity follows the law and the equitable remedy will be withheld if the State Statute of Limitations would bar the concurrent legal remedy.

In the United States Supreme Court, and elsewhere in the Federal system, the aforesaid rule of law has been recognized many times.

In *Helmers v. Anderson*, 156 F.2d 47 (10th Cir. 1946), aff'd. 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947), the Court stated:

> "Although the suit was brought in equity the complaint seeks to enforce a legal right for which equity provides a concurrent remedy to avoid a multiplicity of suits. Bailey v. Tillinghast, 6 Cir. 99 F. 801. In such a case the Federal Court sitting in equity will apply the applicable statute of limitations. Russell v. Todd, 309 U.S. 280, 60 S.Ct. 527, 84 L.Ed. 754."

See also Justice Brennan's concurrence in *McCallister v. Magnolia Petroleum Co.*, 357 U.S. 221, 228, 78 S.Ct. 1201, 1206, 2 L.Ed.2d 1272, 1278 (1958).

In *Cassell v. Taylor*, 243 F.2d 259, (D.C. Cir. 1957), the Court stated:

> "In those instances where the court has concurrent jurisdiction to grant either equitable or legal relief in the enforcement of the asserted obligation, equity follows the law and the equitable remedy will be withheld if the local statute of limitations would bar the concurrent legal remedy. Cope v. Anderson, 1947, 331 U.S. 461, 67 S. Ct. 1340, 91 L.Ed. 1602."

See also *Swan v. Board of Higher Education*, 319 F.2d 56 (2nd Cir. 1963); *Johnson v. Yielding*, 165 F. Supp. 76 (N.D. Ala. 1958); *Shapiro v. Schwamm*, 279 F.Supp. 798 (S.D.N.Y. 1968).

In the case at bar, although the remedy given the Tribe is equitable in nature, potential legal remedies were also available to the Tribe, one of which was money damages for the alleged fraud and connivance

which constituted the basis of the complaint. This being true, under the above cited cases the Tribe's complaint should have been dismissed as untimely filed in view of the overwhelming evidence showing that the Utah three-year Statute of Limitations governing fraud actions had run. Probst had been in possession of the Strawberry land for over seven years, more than three years of which had passed since the termination date, before the Tribe filed its complaint. See Utah Code Annotated 1953, Sec. 78-12-26(3).

The Circuit Court, in denying application of the Utah Statute of Limitations, has misapplied a decision of this Honorable Court, to-wit: *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946). The Holmberg case states that a Federal Court in an action to enforce a federally created right "For which the sole remedy is in equity" is not bound by a corresponding state Statute of Limitations. That decision, when considered in the light of preceding and subsequent cases, clearly was not intended to apply to a situation where legal *and* equitable remedies were available to a litigant, as in the case at bar.

Our Petition for a Writ should be granted in order to prevent divergent rules of law between circuits and particularly to prevent the Tenth Circuit from developing a rule of law at variance with controlling United States Supreme Court decisions.

POINT VI

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY FAILING AND REFUSING TO HOLD THAT LACHES DEFEATED THE UTE TRIBE'S CLAIM.

Whether the Circuit Court was under a duty to apply the Utah Statute of Limitations or not it should, at the very least, have given the running of the Utah Statute of Limitations and the gross untimeliness of the Tribe's complaint great weight in determining whether laches defeated the Tribe's claim, especially in view of the factors pointed out by us in Point IV of this Petition.

The rule for which we contend is set forth in West's Digest under Courts, key number 375, where it is said:

> "A federal court, sitting in equity, will be guided by state statutes of limitations, though not bound thereby in determining if a suit should be dismissed for laches."

In further support of said rule, see *Russell v. Todd*, 309 U.S. 280, 288, 60 S.Ct. 527, 531, 84 L.Ed. 754 (1940); *Leonick v. Jones and Laughlin Steel Corp.*, 258 F.2d 48 (2nd Cir. 1958); and *Larios v. Victory Carriers, Inc.*, 316 F.2d 63 (2nd Cir. 1963).

The Tenth Circuit earlier set forth its understanding of the rule in the case of *Shell v. Strong*, 151 F.2d 909 (10th Cir. 1945), where the Court stated:

> "A court of equity is not bound by the statute of Limitations, but, in the absence of extraor-

> dinary circumstances, it will usually grant or withhold relief in analogy to the Statute of Limitations relating to actions at law of a like character . . .

The decision of the Tenth Circuit Court, in the case at bar, on the laches question is contrary to its own earlier decision in the *Shell* case and is contrary to other controlling decisions in the Federal Court system.

POINT VII.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY SHIFTING THE BURDEN OF PROOF FROM THE SHOULDERS OF THE TRIBE TO THE SHOULDERS OF PROBST IN MAKING THE DETERMINATION OF WHETHER PROBST WOULD BE PREJUDICED BY HAVING HIS LAND TAKEN AWAY FROM HIM AFTER EIGHT YEARS.

Probst proved that the Tribe had knowledge of its so-called statutory right, let that right expire, and did not file its complaint until long after the analogous state Statute of Limitations governing fraud actions had run. It is our position that it should have been the burden of the Tribe to come forward with proof that its unconscionable delay had not prejudiced Probst. The Circuit Court, however, shifted the burden of proof from the shoulders of the Tribe to the shoulders of Probst with the following statement:

> "In any event, Probst has shown no prejudice resulting from the delay. He has been in

> possession of the land since 1959 and has enjoyed the benefits of its use. In our opinion laches is no bar to the claim of the Tribe.

The following cases support our position that the Circuit Court erred in its determination of who had the burden of proof on the issue of prejudice.

In *Kelley et al v. Boettcher, et al.*, 85 F. 55, 62 (8th Cir. 1898), the Court stated:

> "When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."

See also *Backus-Brooks Co. v. Northern Pac. Ry. Co., et al.*, 21 F.2d 4, 12 (8th Cir. 1927), Cert. den. 275 U.S. 562, 48 S.Ct. 120, 72 L.Ed 427 (1927); *Citizens Savings & Trust Co. v. Belleville & S.I.R. Co.*, 157 F.73 (7th Cir. 1907); and *Larios v. Victory Carriers, Inc.*, supra.

Until its decision in the case at bar, the Tenth Circuit Court was clearly in line with the general rule of law as pronounced by the foregoing authorities. See *Shell v. Strong*, supra, where the Court stated:

> "When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the complaint or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches. *On the other hand,*

when the suit is brought after the statutory time has elapsed, the burden is on the complainant to aver and prove circumstances making it inequitable to apply laches to his case."

We believe this Honorable Court should grant our Petition in order to reaffirm the rule of law pronounced in the cases cited herein, so that opposite rules in different circuits can be avoided, and particularly so that the Tenth Circuit Court may be prevented from moving away from its own rule as pronounced in the *Shell* case, supra.

POINT VIII.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY DEPRIVING PROBST OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

At the time of trial, the *Shell* case, supra, was the law of the Tenth Circuit. Under *Shell* if Probst could establish as a defense that the State Statute of Limitations had run, the burden of proof would shift to the Tribe to show that Probst would not be prejudiced by being deprived of his land. Absent such proof, the Statute of Limitations and laches would be a defense and Probst would win. Now the Tenth Circuit Court has said "In any event, Probst has shown no prejudice resulting from the delay." This constitutes a clear reversal of the law as it had previously existed in the Tenth Circuit and upon which counsel for Probst were

entitled to rely at the time of trial. If counsel for Probst had known that they must prove that Probst was prejudiced by the failure of the Tribe to more timely file its action in order to take advantage of the defense of laches they might have tried the case in a different manner. For instance, they might have established that in 1964 the Strawberry land was marginal range land but that in 1967 proposed development of the Strawberry reservoir had changed the land to recreation land with a spectacular increase in its value. They might have established that loss of the land would require Probst to scrap expensive and time-consuming plans for future development of the land.

We submit that Parley Probst was denied a substantial property right without due process of law contrary to the Fifth Amendment to the Constitution when a different and more onerous burden of proof was placed on his shoulders by the Tenth Circuit Court at a time when it was too late for him to meet that burden.

POINT IX.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS FASHIONED AN INEQUITABLE AND DISCRIMINATORY REMEDY THAT WOULD OPEN THE DOOR FOR A MULTITUDE OF INAPPROPRIATE LITIGATION, BY HOLDING THAT THE UTE TRIBE IS ENTITLED TO RECEIVE THE STRAWBERRY BAND UPON PAYMENT OF $35,000.00.

The Circuit Court has fashioned a remedy on behalf of the Tribe which was not provided for in the Termination Act. The justification given is that "When federally secured rights are involved, federal courts must adjust their remedies to grant appropriate relief." But in its effort to "adjust" the remedies in this case the Circuit Court has failed to consider the far-reaching and undesirable after-effects that will arise from such an adjustment.

For example, assuming the right of first refusal to exist on the Strawberry land, it clearly existed for each and every member of both the full-blood and the mixed-blood members of the Tribe. In addition, if the Tribe as an entity had such a right on behalf of the full-bloods, then by the same token, the Affiliated Utes had the same right on behalf of the mixed-bloods. There are more than 1800 members of the Ute Tribe. What is to prevent any number of them from coming in, now that their respective rights of first refusal have been recognized, and now that the Circuit Court has held that the Statute of Limitations and laches are no defense, and offering to meet the $35,000.00 figure? As a matter of fact, the Uintah-Ouray Indian Ageney records show that following the denial by the Circuit Court of the Petition for Rehearing in this case, the Affiliated Utes made a written tender of the $35,000.00 in compliance with the regulations of the Secretary (see Appendix No. X). And it now becomes clear that even if the Circuit Court's decision is sustained the Tribe may nevertheless fail in its attempt to obtain the Strawberry land. This is true because two qualified *members* of the Tribe have undertaken to exercise their

so-called rights of refusal, one by filing this lawsuit, and one by making a proper *tender* of the offering price. It would now appear necessary, in accordance with 25 C.F.R. 243.7, that both submit sealed bids, in order to determine which one gets the property.

We believe that such sealed bids may very well not be proper, however, until posting has taken place, in view of the fact that to allow the two entities to bid under a statute and regulations that required posting as a necessary first step in the exercising of the right of first refusal would be discriminatory and would defeat the purpose of the offering provision in Sec. 477n, which was to give an *equal* right of refusal to every individual full-blood and mixed-blood member of the Tribe.

We submit that there is no way to protect the right of first refusal on behalf of the members of the Tribe, assuming it to exist, other than to go all the way, including posting of offers, accepting of bids, etc. To do otherwise would be to invoke an unconscionable discrimination between equally entitled members of the Tribe.

Yet if a posting and bidding procedure is to be set up after all these years, impossible difficulties become readily apparent. Conditions have so changed that there is no way of recreating the situation existing on and prior to August 27, 1964. Many members have died. Some have estates in various stages of probate. Heirs have dispersed. Then, too, the value of the land has changed dramatically. The Circuit Court itself recognized the difficulty involved where it stated: "It

is impossible to reconstruct what would have occurred if Elizabeth had made the required offering. In addition, the ten-year period fixed by the statute has passed."

And we keep coming back to the very fundamental proposition that the Tribe is responsible for the impossibility of recreating conditions as they existed on and before August 27, 1964. Curry's deliberate non-action for over three years after the termination date takes care of that matter completely. In addition, Curry's non-action points up the stubborn fact that on and before August 27, 1964 the Tribe was not interested in paying $9,000.00 more than the Government appraisal for the Strawberry land. The Circuit Court stated:

> "To do equity a decree should put the parties in the position where they would have been if the required offer had been made."

We wish this could be done because we are confident that thusly positioned the Tribe would repeat its then position and would do exactly nothing.

What this matter really gets down to is that the Trial Court was correct when it stated in its Conclusion of Law No. 11, "In the case at bar the plaintiff tribe suggests injury by being deprived of the opportunity of acquiring the property for $35,000.00. It is speculative because of the impossibility of reconstructing what would have happened should the property have been posted that the tribe would have acquired the property at all and certainly it is speculative that it would have acquired it for $35,000.00."

We submit that our Petition should be granted, in order to review the substantial errors into which the Circuit Court has fallen. If, as we contend, the Tribe did *not* acquire a statutory right of first refusal, then a declaration to that effect would avoid the innumerable legal complications to which we have herein alluded.

CONCLUSION

We respectfully submit that there are strong and compelling reasons why this Honorable Court should grant our Petition for a Writ of Certiorari.

The Ute Termination Act was passed into law on August 27, 1954. It established a ten-year transitional period during which the mixed-blood members of the Tribe could gradually develop the independence and self-reliance necessary so that they could achieve full citizenship. The provisions of the Act are complicated and interrelated. Legal interpretations affect not only the litigants here but all of the more than 1800 members of the Tribe and all non-members who entered transactions with members during the transitional period. In the case at bar, the Tenth Circuit Court has held that Sec. 677n applied to the Strawberry land even though Elizabeth's outright purchase of the land had removed it from the category of being a tribal asset before the Probst agreement ever came into existence; and by so doing it has opened the door for the Tribe to now acquire every single parcel of marginal mixed-blood land, sold pursuant to Sec. 677(L)(5) during the transitional period without a posting and

bidding, by simply offering to meet the original sale price. It has interpreted 25 U.S.C. 677n in a way highly inconsistent with the fundamental purpose of the Termination Act and in a way highly inconsistent with the language of the Act. It has held that Sec. 677n did not terminate Federal supervision over mixed-blood land on August 27, 1964 even though the clear intent of Congress was to terminate all Federal restrictions by said date. In so holding it has even come into conflict with itself in the *Reyos* case. It has held that the Tribe could assert its so-called right of first refusal for the first time more than three years after the termination date even though it is abundantly clear that the Tribe with full knowledge of the Probst agreement had waived and abandoned any claimed right of first refusal by its own deliberate non-action.

It has held that the Utah Statute of Limitations and laches are not defenses against the Tribe and has thus placed the Tenth Circuit Court at odds with United States Supreme Court and other Circuit Court decisions, and it has denied Probst his property without due process of law by not allowing him to meet a newly created burden of proof that did not exist at the time of trial.

Furthermore, its holding has already led to a contest between equally entitled entities of the Tribe, which indicates the impossibility of sustaining the Circuit Court's ruling without invoking an inequitable and probably unconstitutional discrimination against the individual members of the Tribe as well as against the Affiliated Ute Corporation. The impossibility of recre-

ating conditions that existed back on August 27, 1964 and the fact that the Tribe's knowledgeable inaction brought about that impossibility are apparent.

There is only one way injustice and legal confusion can be prevented here and that is for this Honorable Court to grant our Petition, to declare that the Tribe has no interest in the Strawberry land, and to return the case to the Circuit Court for a determination of the unresolved issues between Parley Probst and Elizabeth's estate.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1970

No. 637

PARLEY PROBST,
Petitioner,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, AND ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, Deceased,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Respondent, Ute Indian Tribe of the Uintah and Ouray Reservation, in Opposition

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Respondent, Ute Indian Tribe of the Uintah and Ouray Reservation, in Opposition

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (App. III of Petition) and the *per curiam* opinion on rehearing (App. IV of Petition) are not yet reported. No opinion was rendered by the District Court for the District of Utah, but its Findings of Fact and Conclusions of Law (App. II of Petition) and Judgment (App. I of Petition) appear in the Appendix of the Petition.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 20, 1970. A timely petition for rehearing was denied on June 5, 1970, and the petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 United States Code §1254(1).

QUESTIONS PRESENTED

A statute of the United States, Act of August 27, 1954 (68 Stat. 868, 25 U.S.C. §677 et seq.), provided for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; and for the termination of federal supervision over the property of the mixed-blood members of said tribe; and provided for a development program for the full-blood members; and for other purposes. The questions presented are:

1. Whether, under the circumstances of this case, said act conferred upon the Ute Indian Tribe a right to meet the price at which the selling mixed-blood offered land acquired from tribal assets.

2. Whether this action by the Ute Indian Tribe was barred by the Utah Statute of Limitations or by waiver or laches.

3. Whether petitioner Probst was deprived of his property without due process of law contrary to the Fifth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of August 27, 1954 (68 Stat. 868, 25 U.S.C. §677 et seq.), and the regulations involved (25 C.F.R. §243 et seq., 1966 Ed.) are set forth in the Petition Appendix, pages A-60-62, A-63, A-67, respectively, except Sections 5 and 8 of the Act of August 27, 1954 which were as folows:

> Section 5. Effective on the date of publication of the final rolls as provided in section 8 hereof the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in this Act. (68 Stat. 868, 25 U.S.C. §677[d]).
>
> Section 8. The tribe shall have a period of thirty days from the date of enactment of this Act in which to prepare and submit to the Secretary a proposed roll of the full-blood members of the tribe, and a proposed roll of the mixed-blood members of the tribe, living on the date of enactment of this Act. If the tribe fails to submit such proposed rolls within the time specified in this Act, the Secretary shall prepare such proposed rolls for the tribe. Said proposed rolls shall be published in the Federal Register, and in a newspaper of general circulation in each of the counties of Uintah and Duchesne in the State of Utah. Any person claiming membership rights in the tribe, or an interest in its assets, or a representative of the Secretary on behalf of any such person, within sixty days from the date of publication in the Federal Register, or in either of the papers of general circulation, as hereinbefore provided, whichever publication date is last, may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from either of such proposed rolls. The Secretary shall review such appeals and his decisions thereon shall be final and conclusive. After disposition of

> all such appeals to the Secretary, and after all transfers have been made pursuant to Section 4 hereof the roll of the full-blood members of the tribe, and the roll of the mixed-blood members of the tribe, shall be published in the Federal Register, and such rolls shall be final for the purposes of this Act. (68 Stat. 869, 25 U.S.C. §677[g]).

Sections 5 and 8 were both amended on August 2, 1956 by adding, at the end of Section 5, the following sentence:

> New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder. (70 Stat. 936, 25 U.S.C. §677[d]).

and by adding, at the end of Section 8, the following:

> , but this Act shall not be construed as granting any inheritable interest in tribal assets to full-blood members of the tribe or as preventing future membership in the tribe, after the date of enactment of this Act, in the manner provided in the constitution and bylaws of the tribe. (70 Stat. 936, 25 U.S.C. §677[g]).

Other sections only incidentally involved will be quoted in the Argument.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is argumentative, inaccurate, misleading and prolix with minutiae immaterial to the consideration of the questions presented. We venture our statement with the hope of being helpful to the court. The inaccuracies and misleading statements of petitioner will be discussed in our argument.

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. §1362 because the action was brought

by an Indian Tribe under the Act of August 27, 1954, 25 U.S.C. §677 et seq.

The respondent Ute Indian Tribe sued for certain equitable relief and for cancellation of a deed given by respondent Orianna B. Moosman as administratrix of the Estate of Elizabeth Bumgarner Poowegup to petitioner Parley Probst. Petitioner, at the trial, asserted the validity of the deed and counterclaimed for damages. The administratrix denied that the Tribe was entitled to equitable relief, but by way of cross-claim against the petitioner Probst, asserted that the deed to him was void. The District Court held that the administratrix was entitled to the land. Both the Tribe and Probst appealed.

The Court of Appeals for the Tenth Circuit reversed and remanded the case for further proceedings, granting the Tribe the equitable relief sought. (App. III of Petition).

The assets of the Tribe were divided between the full-blood and mixed-blood groups as required by the Act of August 27, 1954 (25 U.S.C. §677[i]). After a plan was adopted for the division of the assets between the two groups, a plan for distribution of the assets of the mixed-blood group to the individual members thereof was prepared as required by 25 U.S.C. §677[l]. If a majority of the mixed-blood group decided that partition of any land was impracticable and, if the Secretary of the Interior approved, the land could be sold and the proceeds divided among the members of the group. (25 U.S.C. §677[l]-(5), App. XI of Petition, p. A-61). In the division between the two groups, the mixed-bloods received the 3,200 acres of land

in question. They decided that partition was impracticable and that the land should be sold. It was appraised at $26,600.00. Secretarial approval was not an issue in that transaction.

Elizabeth Bumgarner, who later married, acquiring the additional name of Poowegup, submitted the high bid of $26,016.00 for the land which was advertised to the mixed-bloods only. She did not have the necessary money and interested the petitioner in the land. Before the termination of federal supervision, a mixed-blood could dispose of his interest in acquired tribal property only with the approval of the Secretary. (25 U.S.C. §677[n]. App. XI of Petition, p. A-61; 25 C.F.R. 243.3 [1966 Ed.], App. XII of Petition, p. A-64). Federal supervision over tribal land terminated when a patent issued thereto. (25 C.F.R. §243.2[h], App. XII of Petition, p. A-64). Until August 27, 1964 a patent conveying any tribal land to a mixed-blood had to provide that until that date members of the Tribe had the right of first refusal of an offer to sell. (25 U.S.C. §677[n], App. XI of Petition, p. A-61; 25 C.F.R. §243.4, App. XII of Petition, p. A-65). A written contract was prepared and executed on October 28, 1959 whereby Elizabeth sold to petitioner for $35,000.00 and petitioner went into immediate possession. (App. V of Petition). The contract recognized that no patent had been issued and that Elizabeth would have to comply with the first refusal provision of the statute. Elizabeth gave petitioner a $35,000.00 mortgage on the land to assure compliance with the contract terms. (App. VII of Petition). The mortgage was duly recorded. It did not state the nature of the contract it secured and made no reference to a sale. Neither the contract nor

the mortgage was submitted to the Secretary for his approval.

On August 11, 1960 the Secretary promulgated regulations as authorized by the act (25 U.S.C. §677[z]. See 25 C.F.R. §§243.1-243.12 [1966 Ed.]). A patent was issued to Elizabeth on September 20, 1960. (App. IX of Petition). It contained the first refusal provision required by the statute and regulations. On November 11, 1960 Elizabeth and petitioner executed an amendment to the October 28, 1959 contract. (App. VI of Petition). It provided that certain escrow funds be released to Elizabeth; that the required offering should not be made "until such time as the party of the first part [petitioner] requests that the same be made"; and that if such offering were made at petitioner's request certain conditions for his protection should be included with the offer.

Elizabeth was killed in an accident on November 27, 1963 without making the offer and without conveying to petitioner. Oranna B. Moosman was appointed administratrix of Elizabeth's estate. Petitioner filed a creditor's claim against the estate on the basis of the 1959 sales contract and mortgage. (App. VIII of Petition). The petitioner did not inform the court or the attorney for the estate of the 1960 agreement. Pursuant to court order the administratrix conveyed the land to petitioner by a September 21, 1964 deed which was recorded on October 5, 1964. The pending suit was brought by the tribe on September 20, 1967.

ARGUMENT

I

THE DECISION BELOW THAT THE UTE INDIAN TRIBE HAD A STATUTORY RIGHT OF FIRST REFUSAL UNDER 25 U.S.C. 677(n) WAS CLEARLY CORRECT.

The land involved in this controversy was a part of the tribal assets of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, and was distributed to the mixed-blood members thereof, as a part of the division between the full-blood and mixed-blood groups as required by the Act of August 27, 1954 (25 U.S.C. 677[i]). The mixed-blood members determined that a partition of the land was impractical and decided to offer it to the highest bidder among their group with the proceeds to be divided among all members of the group. Elizabeth, a mixed-blood, purchased the land for the sum of $26,016.00 and the proceeds were divided among all of the mixed-blood members in accordance with the plan for distribution of the assets of the mixed-blood members to the individual members thereof as required by 25 U.S.C. 677[i]. As a part of the division among themselves, the mixed-bloods were thereby given an opportunity to bid upon the land without competition from the full-bloods or from outside parties. Elizabeth thus acquired the land in question by virtue of the plan for distribution among the individual members of the mixed-blood group, paying owelty to the other mixed-blood members in accordance with her bid. Elizabeth determined to dispose of her interest thus acquired when she entered into the agreement of October 28, 1959. Under such circumstances 677[n] clearly required that she first offer it to the members of the tribe, and no sale *of any interest*, prior

to termination of federal supervision, could be authorized without first offering it to the members of the tribe in such form as was to be approved by the Secretary.

Petitioner stated, at page 5 of his brief:

> Said section of the Act. [677(n)] further provided that federal supervision *over mixed-blood land*, including the offering requirement, was to terminate on August 27, 1964. (Emphasis added).

Section 677[n] does not provide when federal supervision shall terminate. In fact, it does provide:

> After termination of federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of such period.

The ten year period expired on August 27, 1964. The requirement of such offer, in form approved by the Secretary, became a covenant to run with the land, ending August 27, 1964, and was explicitly so provided in the patent issued to Elizabeth prior to the expiration of said period. Elizabeth did not make the offer as required by law and the court has granted equitable relief to avoid thwarting the expressed intent of Congress.

At page 8 of petitioner's brief it is stated:

> Elizabeth's patent was recorded on November 14, 1960 (See Appendix IX). One of the provisions in the patent was as follows:
>
> > Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members of the full-blood and mixed-blood groups of the Ute Indian Tribe . . .

The balance of the provision in the patent which was not quoted by petitioner is as follows:

> of the Uintah and Ouray Reservation in accordance with regulations now or hereafter prescribed by the Secretary of the Interior pursuant to the Act of August 27, 1954 (68 Stat. 868). This provision shall also apply to any successor in interest of such grantee who is also a member of the mixed-blood group as defined in the act, it being the intention of this provision to effectuate the purpose of Section 15 thereof. (App. IX of Petition, p. A-53).

Quoting only part of the provision is misleading since it would appear from the first sentence that the offer need not be made until disposition of the interest. The specific language set forth in the patent was provided by 25 C.F.R. §243.4. (App. XII of Petition, p. A-65). A significant part of Section 15 of the statute which is referred to in the above quotation, is:

> In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from the date of enactment of this act, he shall first offer it to members of the tribe, and no sale of any interest, prior to termination of federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period. (25 U.S.C. §677[n], App. XI of Petition, p. A-62).

Thus it will be seen that the requirement of first offering to members of the Tribe shall be made when the mixed-

blood member determines to dispose of his interest, not when he disposes of it as implied from the partial statement in petitioner's brief. Under some circumstances it may be extremely difficult to ascertain the subjective intent of a person, but here Elizabeth agreed in writing:

> WHEREAS, party of the second part desires to sell said property to party of the first part for Thirty-Five Thousand Dollars ($35,000.00) and,
>
> * * * *
>
> 1. Party of the second part agrees to sell, and party of the first part agrees to purchase the following described real property situated in Wasatch County, State of Utah, to-wit . . . (App. V of Petition, pp. A-40, A-41).

Perhaps the most reasonable interpretation to be given the statute would vest a right of first refusal in the Tribe upon actual acceptance of an original offer. This interpretation allows this mixed-blood Indian the opportunity to change her mind up until the time of actual acceptance of the offer as in normal contract law.

The trial court found that "Elizabeth C. Bumgarner *determined to dispose of her interest* in the lands, the subject of this litigation, on or prior to October 28, 1959 . . . " (Emphasis added) (App. I of Petition, p. A-9). Although there was no attempt made to have the contract approved by the Secretary or otherwise comply with the law, the acceptance of petitioner's offer by execution of a written agreement is sufficient to unconditionally vest the right of first refusal as required by 25 U.S.C. §677[n].

II

THERE IS NO CONFLICT OF DECISION.

A. Termination Date.

Petitioner presents as his second question for review whether the United States Court of Appeals for the Tenth Circuit committed reversible error by holding that the bidding provision of 25 U.S.C. §677[n] did not terminate on August 27, 1964. The Court of Appeals made no such holding. In fact it stated:

> Until August 27, 1964 a patent conveying any tribal land to a mixed-blood had to provide that until that date members of the tribe had the right of first refusal of an offer to sell. (25 U.S.C. §677[n], 25 C.F.R. §243.4, App. III of Petition, p. A-27).

The Cort of Appeals further stated:

> The question remains of what relief the court should fashion to remedy the wrong. When federally-secured rights are invaded federal courts must adjust their remedies to grant appropriate relief. J. I. Case Co. v. Borak, 377 U.S. 426, 433; see also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414, n.13. It is impossible to reconstruct what would have occurred if Elizabeth had made the required offering. In addition the ten year period fixed by the statute has lapsed. (App. III of Petition, p. A-33).

Petitioner's third question for review is dependant upon the substance of its false assumption in its second question. Since the court did not hold that the bidding provisions of 25 U.S.C. §677[n] did not terminate on August 27, 1964, there is no conflict with the *Reyos Case*. (App. XIII of Petition). The case at bar was not over-

looked in the *Reyos Case*. The *Reyos Case* cited the *Probst Case*, stating:

> The right was granted clearly to permit the members of the Tribe, the Tribe, or the full-blood members to have the first right to purchase property which was for their benefit in an economic and practical way, and if any purchase was to be made, the members of the Tribe or the Tribe had to do it. (App. XIII of Petition, p. A-79).

B. Waiver, Laches and the Statute of Limitations.

Petitioner alleges that the lower court's decision in the instant case regarding waiver, laches and the statute of limitations is in conflict with the decisions of this court, other courts of appeal, and even its own earlier decision in *Shell v. Strong*, 151 F.2d 909 (10th Cir. 1945). Petitioner's assertion rests upon the false notion that the Tribe commenced this action after the three year Utah Statute of Limitations had run. Both the trial court and the Court of Appeals for the Tenth Circuit reached the inescapable conclusion that the events which gave the Tribe notice of the conveyance occurred within the three years before the institution of the suit since it was impossible for the Tribe to have knowledge of the Probst-Bumgarner transaction prior to its completion on September 12, 1964. Notwithstanding the specific finding of the lower courts in the instant case, petitioner insists upon recounting in laborious detail his version of the evidence made "mountainous" by petitioner's unflagging redundancy. Lest the court be misinformed, the trial court held:

> In the summer of 1966 plaintiff [Ute Indian Tribe] by and through its employees and agents and the administratrix of Elizabeth C. Bumgarner's estate

> first discovered the fraudulent scheme, artifice and design employed by defendant Probst in connection with his contracts and relations with Elizabeth C. Bumgarner to prevent others from having an opportunity to purchase said property as provided by law and could not by reasonable diligence and inquiry have sooner discovered said unlawful scheme, artifice and design. (App. of Petition, pp. A-17, 18).

The Court of Appeals for the Tenth Circuit further found:

> The reliance of Probst upon laches is misplaced. The analogous, but inapplicable, Utah statute of limitations is three years. As we have heretofore pointed out, the events which gave the Tribe notice of the conveyance without the required offer occurred within three years before the suit was brought. In the circumstances, the burden is on the defendant to show extraordinary circumstances which require the application of the doctrine of laches. Shell v. Strong, 10 Cir., 151 F.2d 909, 911. Probst made no such showing. (App. IV of Petition, pp. A-38, 39).

Petitioner's claim of conflict of decision, based upon the imagined change of position of the Court of Appeals, is frivolous. By requiring petitioner to show extraordinary circumstances, making necessary the application of the doctrine of latches, the Court of Appeals leaves the law unchanged with respect to the burden of proof applicable to the defense of laches, especially as it was enunciated by that court in the *Shell Case*:

> When a suit is brought within the time fixed by the analgous statute, the burden is on the defendant to show, either from the face of the complaint or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches. (*Shell v. Strong, supra*, at 911).

At page 10 of petitioner's brief it is stated:

> Based upon said minute entry, the Trial Court made the following Findings of Fact:
>
> "27. As early as November 18, 1959 plaintiff, the Ute Indian Tribe of the Uintah and Ouray Reservation had knowledge of the October 28, 1959 executory sale of and between Elizabeth C. Bumgarner as seller and Parley Probst as buyer, said knowledge being evident by the minutes of a meeting of said tribe on November 18, 1959. . . "

This partial quotation is indeed misleading since the remaining portion of the finding conveyed the contrary opinion, which is as follows:

> While plaintiff was further aware of Probst's continuing interest in 1960, it had no notice or knowledge of any fraud in connection with the sale of said land (except as may have been constructively given by the recording of the Administratrix's Deed without posting having been made) until the year before the commencement of this action, September 20, 1967. (App. II of Petition, pp. A-15,16).

An inaccurate statement, not supported by fact or evidence, that Boyden was a member of the Tribal Business Committee (Brief of Petitioner, p. 10), or emphasis on the words "isolated tract," when all Section 9 lands (25 U.S.C. 677-[h]) were isolated tracts, adds nothing to the determining factors. The fact remains that the circumvention of the statute was not complete until the deed was obtained and recorded.

Petitioner further contends that *Holmburg v. Armbrecht*, 327 U.S. 392 (1946), has been misapplied to the instant case on the ground that the Tribe possessed potential

legal remedies in addition to the equitable remedies sought by this action. As correctly stated by the Court of Appeals for the Tenth Circuit:

> Plaintiff-appellant Ute Indian Tribe sued for certain equitable relief and for cancellation of a deed given by defendant-appellee Oranna Moosman as administratrix of the estate of Elizabeth Bumgarner Poowegup to defendant-appellant Parley Probst. (App. III of Petition, p. A-26).

Land is unique and there are no legal remedies which provide the relief sought by the Tribe in enforcing its right of first refusal.

III

THERE IS NO CONSTITUTIONAL QUESTION INVOLVED.

The purported constitutional issue is asserted by reason of the Court of Appeals for the Tenth Circuit allegedly changing the existing law by placing a different and onerous burden of proof on petitioner, thus taking petitioner by surprise and depriving him of his property without due process of law. As discussed in the preceding section, the law applied by the lower court is consistent with its own prior decision in the *Shell Case*, *supra*, and the decisions of this court referred to by petitioner. If petitioner misapprehended that law, there is no logical basis for the proposition that when he was schooled by the Court of Appeals, it constituted an unlawful taking of his property.

IV.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The absurdity of the assertion that the lands involved in this action are marginal is exceeded by the exaggeration of the impact of the decision upon other supposed transactions. The offering period expired over six years ago and this is the only controversy for failure to offer tribal lands to the Tribe as required by law. Petitioner has either little faith in the assertion that this action, commenced over three years ago, was then barred, or he values not the jewel of consistency.

Petitioner alleges that the door to a multitude of inappropriate litigation has been opened by granting equitable relief to the Tribe. In support of his position he introduces, via the appendix to this petition (App. X of Petition), evidence that was not before the trial or appellate courts. Although this matter is improperly before the court, it will be answered on its merits in respondent's brief in opposition to a companion petition for a writ of certiorari, No. 638, filed by the administratrix of Elizabeth's estate. Determination of the alleged issue between the Ute Indian Tribe and former mixed-blood members of the tribe, who are not parties to this litigation, can have no bearing upon the judicial determinations that have been made against the actions of petitioner Probst. If there is a federal question on this point, petitioner is not a party to it.

The petitioner who entered into a written contract to circumvent the law (App. VI of Petition), never requested

the approval of the Secretary of the Interior on his contract or mortgage (App. III of Petition, p. A-28), failed to describe the nature of the contract in the mortgage (App. VII of Petition, p. A-47), with fraudulent intent failed to disclose to the Utah Probate Court the agreement in circumvention (App. II of Petition, p. A-13, Findings 17 & 18), obtained an adverse decision in the trial and appellate courts, then appeals to the conscience of the highest court in the land, is desperate in his persistence, but falls far short of making an important federal question meriting the consideration of this court.

CONCLUSION

From the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated this 28th day of September 1970.

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